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TWO IMPORTANT RECENT OPINIONS OF THE UNITED STATES SUPREME COURT.

The first case, Hodges v. United States is to be found in 203 U. S. 1; the case of United States v. Shipp, is the other, 203 U. S. 563, the first and last cases in the volume and are negro cases.

These cases are of particular interest when taken in connection with United States v. Cruikshank, 1 Woods, 308, 318, 320, another negro case.

The Hodges case, like that of Cruikshank, involved a conspiracy against the political, civil and natural rights of the negro. The Shipp case pertained to lynchers who hung a negro after he had appealed to the Supreme Court of the United States, and was a contempt proceeding.

Taking all these cases together, it is impossible to escape the conclusion that the negro is a very unfortunate litigant. In the Cruikshank case, the indictment against the conspirators failed to state that he was conspired against to keep him from voting because of his color and descent from the African race. And it was because of this omitted allegation that the conviction of the white conspirators was set aside by the federal court.

In the Hodges case the conviction was based upon a conspiracy to force the negro by fear and intimidation to quit his contract work. In this case the allegation as to his race and color, which was omitted in the Cruikshank case, was clearly set forth, but the fourteenth amendment loomed big with new significance. A few years wrought a change in its meaning. In the Hodges case the court maintained that the fourteenth amendment inhibited state power and not the citizens of a state. The citizens of a state might conspire with impunity against him but the federal power could not be invoked to protect him, although the indictment charged that the conspiracy was directed against him because of his color and African descent. But, the dissenting opinion, by Mr. Justices Harlan and Day, states: "It may also be observed that the freedom created and established by the thirteenth amendment was further protected against assault when the fourteenth amendment became a part of the supreme law of the land, for that amendment provided that no state shall deprive any person of life, liberty or property without due process of law. To deprive any person of a privilege inhering in the liberty recognized by the thirteenth amendment is to deprive him of a privilege in the liberty recognized by the fourteenth amendment. It is true that the present case is not one of deprivation by the constitution or the laws of the state of the privilege of disposing of one's labor as he deems proper. But it is one of combination and conspiracy by individuals acting in hostility to rights conferred by the amendment that ordained and established freedom and conferred upon every person within the jurisdiction of the United States (not held lawfully in custody for crime) of the privileges that are fundamental in a state of freedom and which were violently taken from the laborers in question solely because of their race and color." Referring to the Cruikshank case, the opinion continues: "It became necessary in that case for Mr. Justice Bradley, holding the circuit court, to consider the scope and effect of the thirteenth amendment and the extent of the power of congress to enforce its provisions. Referring to that amendment, that eminent jurist said that: 'This is not a prohibition against the passage or enforcement of any law inflicting or establishing slavery or involuntary servitude, but it is a positive declaration that slavery shall not exist. * * * So, undoubtedly, by the thirteenth amendment, congress has power to legislate for the entire eradication of slavery in the United States.'" The civil rights bill, after liberty had been bestowed on millions of people, essayed among other things, to give them the liberty to make and enforce contracts. "Congress then had a right," continues the opinion, "to enforce its declarations by passing laws for the prosecution and punishment of those who should deprive or attempt to deprive any person of the rights thus conferred upon him." Further on he says: "To illustrate: If in a community or neighborhood composed principally of whites, a citizen of African descent not within the exception of the amendment, should propose to lease and cultivate a farm, and a combination

should be formed to expel him and prevent him from the accomplishment of his purpose on account of his race or color, it cannot be doubted that this would be a case within the power of congress to remedy and redress. It would be a case of interference with the person's exercise of his equal rights as a citizen because of his race." The opinion cites several other cases of equal force, to the same effect, all which the Hodges case throws down.

In the Skipp case it was held a contempt to use violence or to kill one in the custody of the Federal Supreme Court. It discussed the laws of contempt and said it was not limited in declaring and punishing contempts by the acts of congress relating to all other federal courts; that a court created by a constitution had inherent powers which could not be abrogated or interfered with by statutes. It held constitutional creations of greater dignity than those of statutory origin. *In praesentia majoris cessat potentia minoris* this maxim and another made prominent in Hughes' Procedure, namely, *cujus est instituere ejus est abroyare*, are well illustrated in the above cases. As the court speaks from case to case the law changes. The fourteenth amendment like the title to mines changes from case to case. Rights secured by organic law, are in and out of protection, tossed about by every wind of doctrine. The Cruikshank and Hodges cases will allow a repetition of the epitome in the Dredd-Scott case—"a negro has no rights that a white man is bound to respect." The Federal Supreme Court is disposed to amplify its jurisdiction in contempt, but not for the protection of the rights discussed in Cruikshank and Hodges. History is but repeating itself. *In praesenti majoris cessat potentia minoris.*

NOTES OF IMPORTANT DECISIONS.

NEGLIGENCE — ELECTRICITY—UNINSULATED WIRE LEFT IN TREE WHERE CHILDREN LIKELY TO CLIMB, NEGLIGENCE.—The case of Temple v. McComb City Electric & P. Co. (Miss.), 42 So. Rep. 874, is an interesting case decided upon correct principles. The facts are sufficiently set forth in the opinion which is terse and to the point, as follows:

"The citizens of a municipality have the right to the reasonable use of the streets not only on their surface, but above their surface. Many uses of the streets, or the spaces above the streets, may be readily imagined in cities, where buildings are erected 20 to 50 stories high, that might not be available in an ordinary town. The corporations handling the dangerous agency of electricity are bound, and justly bound, to the very highest measure of skill and care in dealing with these deadly agencies. The appellee had the right to such reasonable use of the streets for its poles and wires as the conditions existing at the time in the community warranted. On the other hand, the appellant had the reciprocal right to what was a reasonable use of the streets on his part. The rights of the appellant and the appellee are mutual and reciprocal. Neither could so use his own rights as to wantonly injure the other. These two correlative rights, if the law is obeyed, operate in perfect harmony with each other. There are no interferences, and no vacancies in the sphere of their harmonious movement.

The declaration shows that the tree in which this boy was injured, by contact with an uninsulated wire, was an oak tree, a little tree abounding in branches extending almost to the ground; just such a tree as the small boys of any community would be attracted to, and use, in their play. Whether this appellee knew that this particular small boy was in the habit of climbing this tree or not, it is clear from the averments of the declaration that it did not know the tree, the kind of tree, and knowing that, knew what any person of practical common sense would know—that it was just the kind of a tree that children might climb into to play in the branches. It is perfectly idle for the appellee to insist that it was not bound to have reasonably expected the small boys of the neighborhood to climb that sort of tree. The fact that such boy would, in all probability, climb that particular tree, being the kind of tree it was, was a fact which, according to every sound principle of law and common sense, this corporation must have anticipated. The argument that it did not almost suggests the query whether the individuals composing this corporation, its employees and agents, had forgotten that they were once small boys themselves. The immemorial habit of small boys to climb little oak trees filled with abundant branches reaching almost to the ground is a habit which corporations stretching their wires over such trees must take notice of. This court, so far as the exertion of its power in a legitimate way is concerned, intends to exert that power so as to secure at the hands of these public utility corporations, handling and controlling these extraordinarily dangerous agencies, the very highest degree of skill and care.

The judgment of the court below is reversed, the demurrer overruled, and the cause remanded."

TORTS—EACH OF TWO PARTIES ACTING INDEPENDENTLY, APPROPRIATED TO HIS USE A PART OF PLAINTIFF'S PASTURE, THE LIABILITY, IF ANY, IS SEVERAL.—The case is of Millard v. Miller (Colo.), 88 Pac. Rep. 845, is an example of procedure where the opinion of the lower court was reversed. It was an appeal from the judgment of a justice of the peace for $100. The evidence disclosed the following facts: On the 12th day of December, 1900, H. J. Heckler leased to the plaintiff the S. W. 1-4 and the N. E. 1-4 of section 19, and the N. E. 1-4 of section 29 in township 40, range 10, until March 1, 1904. The lease, *inter alia*, contained the following provisions: "Not subject to release without consent of first party, and subject to sale of land at any time. If there is no crop in the land when sold, party of the second part agrees to take one dollar for plowing and ten cents an acre for harrowing. * * * He further agrees to farm the land in a workmanlike manner * * * and to give to party of first part two-fifths of all the grain raised; and further agrees to deliver said grain in the granaries on said land free of all expenses to first party." In April, 1902, Heckler sold and conveyed the land in section 19 to Charles Millard, and the land in section 29 to Mrs. Katherine Millard. The plaintiff went on and seeded the land in 1902, and when he had cut and threshed the crop he delivered to Charles the rent grain from section 19, and to Frank Millard the rent grain from section 29. Thereafter Millard appropriated to his own use the pasture on section 29. The trial court rendered judgment against Charles Millard for $100, and against Frank Millard for $40, and judgment against both for costs. Whether the plaintiff is entitled to recover the full value of these respective pastures from the defendants in a proper action depends upon the construction to be given to the terms of the lease which we think, under the circumstances, remained in force between these parties for that year. That the plaintiff is not entitled to any relief in this action is too plain to admit of controversy. The liability, if any, against these defendants is several, and must be availed of, if at all, in separate actions. In appropriating the use of the respective pastures, they acted separately. There was no co-operation between them, or community in the wrongdoing alleged, and therefore, under the well-settled rule, they cannot be used jointly. At page 562, subd. "b," 15 Enc. Pl. & Pr., the doctrine on this subject is concisely stated as follows: "Persons who act severally and independently, each causing a separate and distinct injury, cannot be sued jointly, even though the injuries may have been precisely similar in character and inflicted at the same time. A joint tort is essential to the maintenance of joint action. For separate and distinct wrongs in no wise connected by the ligament of a common purpose, actual or implied by law, the wrongdoers are liable only in separate actions, and not jointly in the same actions." Mr. Pomeroy, in his work on Code Remedies (4th Ed.), at section 209, after stating the general rule to the effect that those who have united in the commission of a tort are liable to the injured party without any restriction upon his choice of defendants against whom he may proceed, says: "In order, however, that the general rule thus stated should apply, and a union of wrongdoers in one action should be possible, there must be some community in the wrongdoing among the parties who are to be united as co-defendants; the injury must in some sense be their joint work. It is not enough that the injured party has, on certain grounds, a cause of action against one for the physical tort done to himself or to his property, and has, on entirely different grounds, a cause of action against another for the same physical tort; there must be something more than the existence of two separate causes of action for the same action or default, to enable him to join the two parties liable in the single action. This principle is of universal application."

We cannot agree with the view of the court below that section 13, Mills' Ann. Code, permits a recovery of several judgments against the defendants in this action. While the acts complained of may have been a violation of the plaintiff's rights under the lease, and invasion of such rights constitutes his cause of action, the defendants are answerable only for their separate and individual acts that deprive plaintiff of what belongs to him by the terms of the lease and are in no sense liable jointly or severally upon an "obligation or instrument" as contemplated in this section.

BOUNDARIES—NO ACQUIESCENCE WHERE PARTY IGNORANT THAT A BUILDING ENCROACHES OVER BOUNDARY LINE.—Upon this subject the case of Connell v. Clifford (Colo.), 88 Pac. Rep. 850 is interesting and instructive. It was an action to recover possession of a strip of land about five inches in width on the line of Market street, Denver, running back 90 feet to a point, claimed by the plaintiff below to be a part of lot 27, block 41, East Denver. The answer denied that plaintiff was the owner of the land described; alleged title in defendant as the owner of lot 26, block 41; pleaded the 20-year statute of limitations; and that for more than 35 years previous to the commencement of this action defendant had been in the sole, actual, continued, open, notorious, undisputed and unquestioned occupation and possession of the premises described, with the full knowledge and acquiescence of plaintiff. A reply denied that the occupation and possession of defendant was with the knowledge or acquiescence of plaintiff, and alleged that plaintiff did not know that defendant was in possession of her land until shortly before the institution of this action. Plaintiff's uncontradicted testimony was to the effect that she never consented to defendant's occupancy of the land in controversy, and commenced this action shortly after she discovered the fact of such occupancy. Judgment was for plaintiff.

Counsel for appellant concede that the act of 1893 (3 Mills' Ann. St. [Rev. Supp.] § 2923) cannot be applied to this case, for the reason that to do so would be giving to such an act a retrospective effect, contrary to the inhibition of section 11, art. 2, Colorado Constitution. This concession eliminates from consideration the 20-year statute of limitations pleaded in the answer. But counsel for appellant insists that, prior to 1893, there being no statute in this state limiting the time within which an action to recover real property might be brought, we must be governed by the common law of England, by virtue of sec. 4184, Mills' Ann. St. which adopted the common law of England and the statute passed in aid thereof which had been enacted prior to the fourth year of James I, March 24, 1607, and that the statute of 32 Henry VIII, ch. 2. passed in 1540, should rule this case. The provision of 32 Henry VIII, ch. 2, relied upon, is as follows: "No person nor persons shall hereafter sue, have or maintain any action for any manors, lands, tenements, or other hereditaments of or upon his or their own seisin or possession therein, above thirty years next before the teste of the original of the same writ hereafter to be brought." This statute was not pleaded. The appellate courts of this state have repeatedly held that the defense of the statute of limitations is in the nature of a special privilege, and must be pleaded specially, and unless so pleaded it will be deemed waived. Hexter v. Clifford, 5 Colo. 168; Jennings v. Rickard, 10 Colo. 395, 15 Pac. Rep. 677; Blakely v. Fort Lyon Canal Co., 31 Colo. 224, 73 Pac. Rep. 249; Cuenin v. Halbouer, 32 Colo. 51, 74 Pac. Rep. 885; Adams v. Tucker, 6 Colo. App. 393, 40 Pac. Rep. 783. In Blakely v. Fort Lyon Canal Co., *supra*, it is said, at page 243 of 31 Colo., page 254 of 73 Pac. Rep.: "Counsel for appellants also contend that appellee is barred by the statute of limitations from bringing and maintaining this action, because it appears from the testimony that appellants had been in possession of their water rights for a period of from five to seven years. The plea of the statute, as interposed by the answers, was to the effect that plaintiffs' cause of action did not accrue within six years before the commencement of the suit. The defense of the statute of limitations is affirmative, and must be specially pleaded. The plea as interposed is not good because the statute upon which it is based does not apply to actions of this character." The defense of the statute of limitations is affirmative, and must be specially pleaded, and a plea based on one statute will not admit the defense of another statute. Our conclusion is that the statute of 32 Henry VIII, ch. 2, cannot be invoked in this case for the reason that it was not pleaded.

Counsel for appellant contend that appellee and those under whom she claims, having acquiesced for over 35 years in the adverse occupation of the land in question by appellant and in his construction and maintenance of valuable improvements thereon, cannot now maintain this action. In the view we take of this case, it is unnecessary to discuss or determine whether the possession of appellant was adverse to appellee or not. "Acquiescence cannot be presumed unless the owner has, or may be presumed to have, notice of the possession." Brown v. Cockrell, 33 Ala. 38, 47. "Acquiescence and waiver are always questions of fact; there can be neither without knowledge. The terms import this foundation for such action. One cannot waive or acquiesce in a wrong while ignorant that it has been committed. Current suspicion and rumor are not enough; there must be knowledge of facts which will enable the party to take effectual action. Nothing short of this will do." Pence v. Langdon, 99 U. S. 578, 581, 25 L. Ed. 420. "Acquiescence is where a person who knows that he is entitled to impeach a transaction or enforce a right neglects to do so for such a length of time as that, under the circumstances of the case, the other party may fairly infer he has waived or abandoned his right." Scott v. Jackson, 89 Cal. 262, 26 Pac. Rep. 898, 899. Acquiescence implies a knowledge of the facts; there can be no acquiescence without knowledge of the fact or facts alleged to have been acquiesced in. In the case under consideration there is no evidence in the record to show knowledge upon the part of appellee, or those from whom she derives title, of the fact that appellant had constructed or was maintaining his improvements upon the land in controversy until appellee obtained knowledge of such fact within a short time previous to the commencement of this action. How she ascertained this fact is not disclosed by the record, presumably by an accurate survey of the lines of her lot. The construction and maintenance of appellant's building, one wall of which rested upon appellee's land, was not notice of the fact of such encroachment. Every authority cited by counsel for appellant has been examined with care; not one of them applies the doctrine of acquiescence to a case wherein the facts are such as are disclosed by this record. Otherwise stated, from an examination of all the cases cited by counsel it appears that the party against whom the doctrine of acquiescence was enforced either had knowledge of, consented to, or, by practical location, established, the line which was afterwards sought to be questioned by him. Counsel seem to have recognized the principle above announced, in that it is alleged in the answer that the occupation and possession of the premises in controversy by appellant was "with the full knowledge and acquiescence of plaintiff, her predecessors and grantors." There is an entire absence of evidence in the record to sustain this allegation of knowledge upon the part of appellee, or those from whom she derived title.

AN INTERESTING INSURANCE CASE.

The uncertainties of the law are well illustrated in the case of Fidelity Mutual Life Insurance Company v. Mettler,[1] and its sequel,[2] decided October 26, 1906, by the same court.

In October, 1896, one Wm. A. Hunter took out three ten year policies for $5,000 each in the Fidelity Mutual Life Insurance Company, payable to his sister Mrs. Mettler. On December 3rd thereafter, he left her home, ostensibly to go to Mentone to prove up on some land, leaving the policies with a lawyer. He did not return, and search resulted in finding his wagon near the Pecos River with his gun standing beside it, his bed of blankets and cooking utensils near it; one horse, which had been tied to a tree, was dead, the other had wandered away. Hunter's tracks were found leading to the Pecos River and none returning to the camp. It was also in evidence that the Pecos is a swift and dangerous stream, abounding in quick sands. Upon these facts Mrs. Mettler brought suit on the policies, and the company defended on the ground that Hunter was not dead, and produced evidence that he had been seen recently alive.

A one-third interest in the policies, and an additional sum in case penalties and statutory attorney's fees were recovered, was assigned by Mrs. Mettler to her lawyer, Clark, who by subcontracts divided his interest with others assisting him.

Verdict and judgment were had in plaintiff's favor for the full amount of the policies, 12 per cent. penalty, and $2,500 attorney's fees, which judgment was affirmed by the United States Supreme Court on appeal, that court holding that it was competent for the legislature to impose penalties and attorney's fees upon life insurance companies for defending, although without imposing similar fees or penalties upon other corporations or persons.

A vigorous dissenting opinion was filed by Justices Harlan and Brown, in which they contended that the case should be governed by the rule announced in Gulf, C. & S. F. R. Co. v. Ellis,[3] where it was held that a statute which added to the amount to be recovered for stock killed by railway company "all reasonable attorney's fees" was void as denying the equal protection of the laws secured by the 14th constitutional amendment. In that case the court said: "It is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and punishes them, when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them they are mulcted in the attorneys fees of the successful plaintiff; if it terminates in their favor they recover no attorneys fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorneys fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute," which would seem to justify the position of the dissenting judges.

After affirmance the insurance company paid the amount of the judgment into court and it was divided between Mrs. Mettler, and Clark, and the parties he had contracted with to assist him in accordance with the provisions of their several contracts. Subsequently, it was discovered that Hunter was still alive and his pretended death was a part of a conspiracy to defraud the company. Suit was then brought by the latter against the several distributees of the judgment fund, to compel them to disgorge, and a bill was brought in equity to enjoin the setting up of the judgment at law as a defense.

It is not clear under the decisions of the United States Supreme Court whether such a suit will lie, as appears from the discouraging opinion in Grauer v. Faurot,[4] wherein that court refused to con-

[1] 185 U. S. 308, 46 L. Ed. 922.
[2] Fidelity Mutual Life Insurance Company v. Clark.
[3] 165 U. S. 150, 41 L. Ed. 667.
[4] 162 U. S. 435, 40 L. Ed. 1030.

sider an appeal based on the certificate of the circuit court of appeals for the seventh circuit, asking in effect whether the law was as announced in United States v. Throckmorton,[5] where the proposition was denied, or as laid down in Marshall v. Holmes,[6] where it was conceded.

However, the circuit court, in the case at bar, granted the relief as against the plaintiff—who got $11,616 of the judgment, and refused it as to the lawyers—who got the balance, ($13,412.16) and this ruling was affirmed by the Supreme Court on the ground that the attorneys were innocent instruments in effecting the conspiracy, and that their efforts constituted a valuable consideration for their share of the money received and that they had acquired a legal title to it which could not be disturbed. It was urged in behalf of the insurance company that the attorney's contingent fee was a part of the judgment and must fail if the judgment fails, and the court's reasoning that the judgment was not a part of the attorneys title but "simply afforded the appellant a motive for i s payment into court" will not be convincing to the profession outside of the attorneys benefitted. The attorneys are permitted to retain one-third of the fruits of the fraudulent conspiracy, for their assistance in carrying it out. It is admitted that they acted in good faith but their stipulated reward was a third interest in the judgment to be obtained; the judgment was a fraud but the decision compels the victim to pay the conspirators' attorneys for helping to perpetrate it.

Supposing the subject matter of the conspiracy had been the procuring of goods by false pretenses, could the innocent carrier retain a portion of the goods against the defrauded owner, on the ground that he was to have such part for transporting them? It is to be borne in mind that the decision does not plant itself on the theory that the right of the lawyers was adjudicated and forever set at rest by the judgment, or that the case is at all altered because the thing received was money. It goes upon the theory that the attorneys were good faith purchasers for value of a portion of this money from Mrs. Mettler, and the value given was their services in obtaining it, or in obtaining the judgment compelling its payment. On this theory, if she had assigned to these attorneys a portion of a forged order for collecting it they could not be compelled to disgorge, being innocent of fraud, and the court would say that the order merely afforded the drawee "a motive for payment."

But however we may regard the rules laid down, the entire case is a lamentable miscarriage of justice. The insurance company in the first place is fined 12 per cent. for defending at all against the conspiracy; next, it is compelled to pay $2,500 statutory attorneys fees to the conspirator's attorneys as a reasonable fee for their services in making the fraud effectual; and, finally, is precluded from reclaiming from such attorneys their modest portion of the fruits of the fraudulent conspiracy. However it may strike the profession it would probably be difficult to convince this particular insurance company that the law as thus administered is either the perfection of human wisdom, or adapted to the attainment of substantial justice.

Des Moines, Iowa. I. M. EARLE.

[5] 98 U. S. 61, 25 L. Ed. 93.
[6] 141 U. S. 599, 35 L. Ed. 870.

STATUTE OF LIMITATION BETWEEN TRUSTEE AND CESTUI QUE TRUST IN RECENT CASES.

In the Michigan jurisdiction an attempt will be made to remove the bar of the statute of limitations in the case of a ward against his testamentary guardian by applying the principle enunciated in Mathew v. Briese,[1] that a testamentary guardian is a trustee, and for that reason the statute of limitations is not applicable to accounts as between guardian and ward. In the case of the Duke of Beaufort v. Berty,[2] Lord Macclesfield said: "A guardian appointed according to the statute had no more power than a guardian in socage, and as the court could interfere where there was a guardianship in socage, so might it also do in a case of a guardian by the statute, both being equally trustees." The relation of testamentary guardian and ward is strictly that of trustee and *cestui que* trust. He is not only a trustee of the property as in an ordinary case of trustee, but he is the guar-

[1] 14 Beavan's Rep. 341.
[2] 15 Vesey, 185.
[3] Mathew v. Briese, 14 Beavan's Rep. 341.

dian of the person of the infant with many duties to perform, such as relate to his education and maintenance.[3] Why a distinction should be made as to the character of the guardian is not apparent from the decision, unless it is due to the specific facts in the case. In Michigan there is a statute,[4] which reads: "No action shall be maintained against the sureties in any bond given by a guardian, unless it be commenced within four years from the time when the guardian shall have been discharged." Provided, that if at the time of such discharge, the person entitled to bring such action shall be out of the state, or under any legal disability to sue, the action may be commenced at any time within four years after the return of such person to the state, or after such disability shall be removed. It has been-held that the term "discharge" as used above, must be construed as any mode by which the guardianship is effectually determined and brought to a close, either by the removal, the marriage of a female guardian, the arrival of the ward at the age of twenty-one, or otherwise.[5] In Ottowa Probate Judge v. Stevens,[6] the court held that the four years commenced after he ceased from any cause to be guardian. However, there is an exception to this rule. The verbal promise of a surety on a guardian's bond that he will pay the guardian's account is sufficient to take the case out of the statute of limitations.[7] This case led me to investigate the more recent decisions on the question of the application of the statute of limitations to actions between trustee and *cestui que* trust.

In general the doctrine of laches in equity and the statutes of limitations are analogous in their application. Courts of equity apply the doctrine of laches as a bar to the enforcement of an equitable right, and courts of law enforce the statute of limitations as a bar to a legal right. In cases of trusts created by operation of law, whether implied, resulting, or constructive, and all trusts arising otherwise than by contract *inter partes* as well as all trusts founded on contract, having some of the elements of express trust and having them properly referred to as such, though not subject matter of exclusive equity jurisdiction, courts of equity will generally apply and enforce the statute of limitations analogous thereto according to the period therein specified.[8]

It was early decided in England that as to trusts being an exception to the statute of limitations, the rule holds only as between trustees and *cestui que* trust.[9] The leading case and a classic on the question in this country is Kane v. Bloodgood.[10] In my examination of recent cases I find it cited in every instance, and many extracts taken from Chancellor Kent's opinion. In this case it was held that so long as there is a continuing and subsisting trust, acknowledged or acted on by the parties, the statutes of limitation are not available to a trustee, for the reason that the trustee being clothed with the legal title or possession of the property, and charged with the duty of caring for and preserving the same for the benefit of the *cestui que* trust, the latter has the right to assume that the trustee will perform such duty, unless he has knowledge that the trustee has denied his right, or claimed the possession of the property adversely to him. Chancellor Kent said, in speaking of the kind of trusts exempt from the statute of limitations, "that the trust intended by the courts of equity not to be reached or affected by the statute of limitations are those technical and continuing trusts, which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of this (chancery) court." He further said: "I cannot assent to the proposition that all cases of direct and express trust, and arising between trustee and *cestui que* trust, are to be withdrawn from the operation of the statute of limitations notwithstanding a clear and certain remedy exists at law. The word 'trust' is often used in a very broad and comprehensive sense. Every deposit is a direct trust. Every person who receives money to be paid to another, or to be applied to a particular purpose, to which he does not apply it, is a trustee, and may be sued either at law, for money had and received, or in equity; as a

[4] § 6332, 2 How. St., sec. 31.
[5] Cheever v. Congdon, 34 Mich. 296.
[6] 55 Mich. 320.
[7] Perkins v. Cheney, 114 Mich. 567.
[8] Buttles v. De Braun, 116 Wis. 323, 93 N. W. Rep. 6; Boyd v. Mut. L. Ass'n, 116 Wis. 155, 90 N. W. Rep. 1086, 94 N. W. Rep. 171: Newsom v. The Board, 103 Ind. 526, 31 N. E. Rep. 163.
[9] Rechford and others v. Wade, 17 Vesey Jr. 98.
[10] 7 Johns. Ch. 90, 11 Am. Dec. 417.

trustee, for a breach of trust." In spite of this clear and concise exposition of the law by the learned chancellor, much confusion has arisen from authorities making the general and inaccurate statement that in cases of express trusts the statutes of limitations do not apply. The result has been that some peculiar decisions have been rendered and some peculiar cases presented. These cases have related mainly to the application of the statute of limitations to express trusts in relation to personal property. The inaccuracy of language undoubtedly led the Indiana Appellate Court to decide that where by agreement between the parties, one took possession of the funds of the other, and invested them as he saw fit, and made collections relative to the investments, he was liable as trustee and the statutes of limitations do not run against the right of the *cestui que* trust to recover the trust property from the trustee in a direct and continuing trust, until the trustee openly repudiates the trust and unequivocally sets up a right adverse to the *cestui que* trust to the latter's knowledge, then the statute begins to run. Nevertheless this is true whether the facts show an express continuing trust in the strict sense of the term or not, they do show that there was a relation in the nature of a trust, which, as we have said, shall be governed by the same rules.[11] This case (1904) was reversed and the court said: "The mere fact that there may nave been a mutual trust and confidence existing between the parties, and that appellee placed full confidence in appellant as her agent in loaning and collecting her money, will not suffice to constitute such a trust as to exempt the case from the operation of the statute of limitations.[12] In Newsom v. The Board,[13] in considering the question of the statute, it is said: "These authorities, to which many more might be added, show that it has always been the rule that there are many kinds of trust against which the statute of limitations will run, and they show, moreover, that it is not correct to affirm, as is sometimes done, that the statute never runs in case of a trust. This statement is true of direct technical trusts created by express law, or by deed or will, but it is not true of implied trusts where there is concurrent equity and law jurisdiction.[14] The Supreme Court of Michigan in Jewett v. Jewett's Estate,[15] (1905) held the same way on facts somewhat similar to the ones in the above case. A clear cut and well reasoned opinion was given in Stanley's Estate v. Pence,[16] (1903) where a husband received money belonging to his wife under a parol trust for her children, the same payable on his death, and the trust was never repudiated, held that the statute of limitations did not run against the *cestui que* trust.

In regard to certain fiduciary relations the authorities diverge, one line holds that there are many fiduciary relations established by law, and regulated by settled legal principles and rules, where all the elements of an express trust exist, and to which the same legal principles are applicable,[17] the other line holds that under the circumstances as presented in the cases at bar no such fiduciary relation existed as to establish an express trust which would take them out of the statute of limitations.[18] In Boyd v. Mut. L. Ass'n.,[19] the court said: "It may well be that corporate officers, so far as they handle and control the personal property of the corporation, may rightly be called trustees of an express trust, of which trust the corporation and its stockholders are the beneficiaries.[20] But so far they may be sued at law, they do not come within the chancellor's classification, and hence the running of the statute of

[11] Hitchcock v. Cosper, 69 N. W. Rep. 1029.

[12] Smith v. Calloway, 7 Blachf. 86; Musselman v. Kent, 33 Ind. 452; Newsom v. The Board, 103 Ind. 526, 3 N. E. Rep. 163; Parks v. Satterwaite, 132 Ind. 411, 32 N. E. Rep. 82; Jackson v. Landers, 134 Ind. 529, 34 N. E. Rep. 323.

[13] *Supra.*

[14] Hitchcock v. Cosper, 73 N. E. Rep. 264.

[15] 102 N. W. Rep. 1059.

[16] 160 Ind. 636, 66 N. E. Rep. 51, 67 N. E. Rep. 441.

[17] 137 Ill. 509, 25 N. E. Rep. 530; Cox v. Huntsville Gaslight Co., 106 Ala. 373, 17 So. Rep. 626; Williams v. Reilly, 41 N. J. Eq. 137, 3 Atl. Rep. 692; Somerset Bank v. Veghti, 42 N. J. Eq. 137, 6 Atl. Rep. 278; Williams v. McDonald, 42 N. J. Eq. 392, 7 Atl. Rep. 866; Williams v. McKay, 40 N. J. Eq. 189, 53 Am. Rep. 775; Butts v. Wood, 38 Barb. 188; European and N. Am. Ry. Co. v. Poor, 59 Me. 277; Williams v. Page, 24 Beav. 654.

[18] Mason v. Henry, 152 N. Y. 539, 46 N. E. Rep. 837; Pierson v. McCurdy, 100 N. Y. 608, 2 N. E. Rep. 615; Wallace v. Lincoln Savings Bank, 89 Tenn. 630, 15 S. W. Rep. 448, 24 Am. St. Rep. 625; Hughes v. Brown, 88 Tenn. 578, 13 S. W. Rep. 286, 8 L. R. A. 480; Landis v. Sexton, 105 Mo. 486; Newsom v. Board, 103 Ind. 526, 3 N. E. Rep. 103; Baxter v. Moses, 77 Me. 465, 1 Atl. Rep. 350, 52 Am. Rep. 783.

[19] (1902), 116 Wis. 155, 40 N. W. Rep. 1086, 94 N. W. Rep. 171.

[20] 1 Perry Trust, 5th Ed., § 86,

limitations is not interrupted. As already pointed out their misapplication of funds might at any time have been reached by an action at law by the corporation.

A recent case where a trust was established under a California code, the facts of which are: Pol. Code, § 3426, imposes the duty upon the county treasurer to retain all moneys arising from the sale of swamp lands, and place it to the credit of the swamp land fund of the county. Section 3476 provides that when the lands have been improved and money expended thereon, and this has been certified to the county supervisors, they must certify the facts to the register. Section 3477 provides that the register must thereon make certain credit and charges, and divide the balance of the fund among the original purchasers of the land, or their assigns, and pay to each of them on demand, his share. Held, that the money is held by the state in trust for the purchasers, so that limitations do not begin to run against an action to recover part of it till the trust is repudiated.[21] The same doctrine has been enunciated in United States v. Taylor.[22]

The Wisconsin Supreme Court in construing sec. 2081, Rev. Stat. 1898, relating to uses and trust, and sec. 4206, as applied thereto, has given an excellent exposition of the law in the recent case of Boyd v. Mutual Fire Assn.,[23] The court said: "Our statute, sec. 4206, is general and comprehensive, and in itself makes no exception as against trustees of any kind; and, while we are not inclined to deny or question the authority of the precedents in this court importing into that statute certain exceptions, we are unwilling to assume a practically legislative function, by adding other exceptions which we might deem wise, which the legislature in the exercise of its constitutional discretion has not seen fit to make. These precedents are cited in the former opinion. Several of them go merely to the extent of exempting express trusts within the statute, but two of them suggest like exceptions in certain other cases.[24] The first of these is of but little significance, for in it was no attempt to declare how far the exemption from statutes of limitation do extend, but merely that it does not extend beyond express or acknowledged trusts, and liability to account for proceeds of land wrongfully purchased with money of plaintiff was held barred by limitation. In Fawcett v. Fawcett, however, the limitation was extended to a resulting trust arising upon purchase of land in his own name by a husband with his wife's money, such resulting trust having been acknowledged by him, and having continued unrepudiated during their cohabitation to his death. The statute was held not to apply, because the trust was wholly beyond cognizance of courts of law, and had the characteristics of acknowledgment, continuance, and certainty. Chancellor Kent's classification of trust in Kane v. Bloodgood,[25] was adopted; among other facts, the declaration being that 'other trusts which are the ground of action at law are not exempt.' It seems plain, therefore, that nothing in the prior decisions of this court has established immunity from limitation statutes in favor of any trusts, other than 'these technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of this (chancery) court,' as classified by Chancellor Kent. * * * While express trusts in real property can only be such as are defined and limited by section 2081, Rev. St. 1878, there may be many express trusts in personal property, as pointed out by Chancellor Kent in the case above cited, which are entirely independent of the trusts in real property referred to in section 2081."

Recent decisions growing out of the application of the statute of limitation to trusts in real property are somewhat at variance in different jurisdictions. Limitations did not begin to run until the trust was repudiated where a locative interest in land was held in trust, and possession was taken under such equitable title,[26] nor do the statutes of limitations begin to run until the defendant repudiated the trust, where defendants held property acquired through

[21] Miller & Lux v. Betz, 142 Cal. 447, 76 Pac. Rep. 42.

[22] 104 U. S. 216, 26 L. Ed. 721; Memphis Gaslight Co. v. Memphis, 93 Tenn. 612, 30 S. W. Rep. 25; McGuire v. Lineus, 74 Me. 344.

[23] *Supra.*

[24] Howell v. Howell, 15 Wis. 65; Fawcett v. Fawcett, 85 Wis. 332, 55 N. W. Rep. 405, 39 Am. St. Rep. 844.

[25] *Supra.*

[26] Logan v. Robertson (Tex. Civ. App. 1904), 83 S W. Rep. 395.

legal proceedings by way of equitable mortgage, or transaction amounting to the same thing, in trust for plaintiff on being paid what should appear to be due by him.[27] In Barnett v. Barnett[28] the facts show that appellee was the owner of one-half interest in the lot; that appellant held the legal title to the whole lot, but held an undivided one-half interest to same in trust for appellee, which trust was recognized and not repudiated by appellant until a few months before filing of this suit. The court held that it is well settled that the statute of limitations does not begin to run in favor of a trustee until the trustee repudiates the trust, and the beneficiary has notice thereof.[29] The facts in the above case are somewhat analogous to the facts in a recent Wisconsin case.[30] In this case the court overruled a former decision,[31] and it draws some fine distinctions between the cases, holding that the facts in Merton v. O'Brien do not take the case out of the statute of limitations.

The prerequisites to hold a trust exempt from the operation of the statute are an express trust and a technical, continuing trust, cognizable only in a court of equity.[32] In other words, a direct continuing and subsisting trust, acknowledged and acted upon by both parties, founded on contract *inter partes*, or created by deed of will, and cognizable only under the jurisdiction of a court of equity, is an express trust to which the statute of limitations will not apply. Although the general rule that statutes of limitations do not apply to express trusts, as above defined, still courts of equity always discountenance laches and neglect, upon general principles of their own, independently of the statute of limitations, and refuse their aid to state demands, and the reason of these principles is founded on the following grounds: First, upon the ground of public policy, the peace of society, the inconvenience of the relief. Second, where the presumption arises of something having been done which is adverse and destructive to the plaintiff's demand.

Toledo, O. F. BEECHER.

[27] Potter v. Kimball, 71 N. E. Rep. 308, 186 Mass. 120.

[28] (Tex. 1903), 80 S. W. Rep. 537.

[29] Byars v. Thompson, 80 Tex. 486, 15 S. W. Rep. 1087; Hunter v. Hubbard, 26 Tex. 537; Moore v. Bldg. Ass'n, 19 Tex. Civ. App. 68, 45 S. W. Rep. 674; Smith v. McElyea, 68 Tex. 70, 3 S. W. Rep. 258; Brotherton v. Weathersby, 73 Tex. 472, 11 S. W. Rep. 515.

[30] Merten v. O'Brien, 94 N. W. Rep. 340.

[31] Williams v. Williams, 82 Wis. 393, 52 N. W. Rep. 429.

[32] Kane v. Bloodgood, 7 Johns. Ch. 90, 11 Am. Dec. 417; Buttles v. De Braun, 116 Wis. 323, 93 N. W. Rep. 5; Stanley's Estate v. Pence, 160 Ind. 636, 66 N. E. Rep. 51, 67 N. E. Rep. 441; Boyd v. Mut. L. Ass'n, 116 Wis. 155, 90 N. W. Rep. 1086, 94 N. W. Rep. 171; Jewett v. Jewett's Estate, 102 N. W. Rep. 1059, 12 Detroit Leg. News, 10; Jones v. McDermott, 114 Mass. 400; Potter v. Kimball, 186 Mass. 120, 71 N. E. Rep. 308.

TELEPHONES—ASSIGNMENT OF RIGHT OF WAY.

NORTHEASTERN TELEPHONE & TELEGRAPH CO. v. HEPBURN.

Court of Chancery of New Jersey, Feb. 1, 1907.

The right of a corporation to take title to an interest in real estate cannot be denied by the grantor, but can only be contested by the public authorities.

The grant of a right to maintain a telephone line over certain premises conferred on the grantee the right to construct a single line of poles, and to place thereon any number of cross-arms and wires.

Where defendants granted a right of way for the maintenance of a telephone line to complainant's assignor, and thereafter defendants contended that complainant company had increased the burden of the easement beyond the scope of the original grant and thereupon entered and cut down certain of the wires from the poles, etc., complainant was not required to establish its right to maintain its line in the condition that existed before defendants' acts complained of, in order to entitle complainant to an injunction restraining further interference with its wires.

Where a deed to a right of way for a telephone line was unambiguous, parol evidence was inadmissible to limit it to a grant for the maintenance of a noncommercial line.

Where plaintiff was a *bona fide* assignee of a right of way for the maintenance of a telephone line, it was not bound by an alleged oral agreement between the original parties to the deed conveying such right of way, that the line should be used only for the benefit of the grantee in connection with its waterworks plant.

PITNEY, V. C.: The object of these bills is to protect the complainant in the enjoyment of an easement in land by enjoining the disturbance thereof by the defendants. The easement was created by the predecessors in title of the several defendants in the three causes (which were tried together) by grant made to the predecessor in title of the complainant. The grant was for the right to set up, operate, and maintain "a telegraph or telephone line or lines" over certain lands, and a telephone line was at once erected and has ever since been maintained. The complainant and its predecessors in title have been in

the possession and enjoyment of this easement for several years, and their right to do so has never been, and is not now, seriously contested by the several defendants. The defendants justify their action complained of by complainant, which consisted of cutting down certain of the wires, etc., on the arms of the poles constituting the telephone line, on the ground that the complainant is increasing the burden of the easement beyond the scope of the original grant. That I conceive to be the question involved in these causes, and its solution depends upon the true construction of the terms of the grant. It was made by the predecessors in title of the defendants to the East Jersey Water Company and by it assigned in part to the City of Newark.

One point made by the defendants may be dealt with at the start. They contend that the East Jersey Water Company had no power to take and accept a grant of a right to maintain a telephone or telegraph system. The answer to this objection is simply that it does not lie in the mouth of the grantor of real estate or an interest in real estate to set up that the grantee was incapable of receiving and accepting the title or right so conveyed. Only the public authorities can take advantage of that disability. The authorities on that question are abundant, and are collected and collated by Justice Harlan in Fritts v. Palmer, 132 U. S. 282, at page 291 *et seq.*, 10 Sup. Ct. Rep. 93, 33 L. Ed. 317. Coming now to the grant itself—the language is this, as found in the deed from Henry Hepburn and wife to the East Jersey Water Company, dated July 3, 1891, the grantors "do hereby grant and convey to the East Jersey Water Company * * * its successors and assigns, the right of way over, through and across the lands hereinafter described, situate," etc., "* * * in and upon which to lay, operate and maintain a water pipe or water pipes for the transportation of water to the city of Newark in said state and other places; such pipe or pipes to be laid within a space not exceeding the width [99 feet] particularly described in the description hereinafter set forth, with the right to set up, operate and maintain a telegraph or telephone line or lines thereon and with right of ingress and egress to and from said right of way for all purposes." Then follows a description of the right of way 99 feet wide. After the habendum clause which follows the description we find this language: "The possession and use of the said premises are to be and remain in the said grantors, their heirs, executors, administrators and assigns, subject to the grant herein made, as fully as if this conveyance had not been executed." This language is the same in each of the conveyances of the predecessors in title of the defendants, and was probably found in a printed form used by the East Jersey Water Company in acquiring a right of way for their works from the northern portion of Morris and Passaic counties to the city of Newark and elsewhere. That company assigned to the city of Newark its rights in this right of way by a deed dated May 2, 1892, which recites an agreement of September 24, 1889, and then conveys to the city all the works in the meantime erected by the water company "with all and singular their appurtenances, adjuncts and appliances of whatever nature, kind or description soever. * * * And also all and every the lands and rights of way over which the conduit or conduits, pipe line or lines have been laid or constructed, and all and singular the lands and rights of way acquired," etc., "together with all and singular the ways, profits, privileges and advantages," etc., with a corresponding habendum. This deed seems to be ample to convey every sort of right which the water company acquired by the conveyances from the defendants. Later on, however, in 1900, another agreement was made between the water company and the city by which the water company expressly conveyed to the city its right, title, and interest in the existing telephone line here in question, with an exception or reservation to the water company of the right to maintain two telephone or telegraph wires upon the poles conveyed, and a joint agreement for the maintenance of the poles. This right was later on assigned by the city of Newark to the complainant by deed dated August 24, 1905. That assignment is special and reserves certain rights in the city, or rather, in consideration of the conveyance, the complainant herein agreed to perform certain services for the city. Shortly after this arrangement the complainant entered upon the right of way and replaced the telephone poles, already in existence with larger poles, and placed upon them larger arms and prepared to string upon them a greater number of wires, but did not increase the number of poles. The sole increase of the burden of the easement was a subsequent increase in the number of wires strung on the poles. As soon as this increase was made, the defendants entered on the right of way and cut off all the wires, *manu forti*. Subsequently they restored two wires, being the number in use before the increase. Upon *ex parte* application to this court, an injunction was granted, and under its protection, the cut wires were restored.

It is not easily perceived how the adding of additional wires, and, if you will, arms on the poles increases perceptibly the burden of the easement. The language of Mr. Justice Dixon in Slingerland v. Newark, 54 N. J. Law, 69, 23 Atl. Rep. 131, is significant in this connection: "Under these circumstances, it is not apparent how the prosecutor can have any legal concern with the quantity of water drawn through the acqueduct, or with the use made of so much of it as the public does not need." In fact the circumstances show that the right and interest of the owners of the fee in the soil is of little practical value. It resembles the ownership of the soil of a railway strip subject to the easement of the railroad. The East Jersey Water Company conveyed to the city of Newark the right of way for pipes and

telephone lines over only a part of the whole strip, 24 feet in width. The water company reserved to itself the right to lay pipes for its own use on the rest of the strip. The city has and maintains two large parallel mains besides its line of telephone poles. Besides these easements is the general right of way from end to end of the whole strip which is naturally and necessarily in constant use and must be nearly or quite exclusive in its character. But the complainant itself has encouraged the defendants in the notion that the additional use to be made by it of this telephone line over and above that which the city previously used has some pecuniary value by providing by a sort of stipulation in its contract of assignment with the city that it would attempt to acquire from all the owners of the fee along the miles of the pipe line the right to make this additional burden on the land. This right it did acquire on what was, to it, satisfactory terms, from all the other owners of the fee, but was unable to agree with the defendants. This conduct on the part of the complainant ought not, and will not, prejudice its right to the relief it asks in this court if such right is clear under its contract. The defendants assert that it is not clear. Their counsel does not argue that the grant is not in terms very broad and general, and I have already expressed the opinion that they cannot take advantage of the circumstance that the water company was not capable, under its charter, to enter into the business of carrying on a telephone line for public purposes, but their counsel relies on a single word in the grant taken in connection with the circumstances to manifest an intention on the part of the grantors to confine the use of the telephone line to a use in connection with and as an adjunct to the beneficial use of the great waterworks the water company was about to construct. The word relied upon is the single word "with" which follows the grant of the right to lay, operate, and maintain a water pipe or water pipes over the land in question, and precedes the words "the right to set up, operate and maintain a telegraph or telephone line or lines" on the land.

But two matters must be taken into account in considering the force of the word "with." First, the grant is a right to maintain a line or lines, leaving the number unlimited. Now, it is quite clear and undisputed that by a line of telegraph or telephone poles is meant a line of poles carrying an unlimited number of wires, and that such a line is not rendered plural in its nature by having more than one wire stretched upon it. It still remains a single line; hence the use of the plural in the grant is significant. And the question arises how could it be supposed that the water company could ever need more than one line of poles for its use in connection with the waterworks. The other matter is that the grant of the right to maintain telephone and telegraph line or lines is followed in the same part of the sentence with a grant of ingress and egress to and from the right of way "for all purposes." Now it seems to me that the words "for all purposes" cannot be entirely ignored, although its immediate connection is with a grant of a right of way. Moreover, it seems to me that, if the parties had intended to limit the right to maintain the telegraph and telephone poles to a use strictly in aid of the original construction and subsequent maintenance and operation of the great waterworks they would have said so. The fact is that the burden of the telephone and telegraph line of poles is not affected or increased or varied by the number of messages sent over the wires; and hence there was no occasion to make any provision on this subject. If the defendant's contention in this behalf is sound then it follows that it is not within the right of the water company or its assignee, the city, or the complainant, as the assignee of the latter, to send a single message from the city of Newark over the line to Newfoundland which does not relate to the business of the water supply, and, according to the practice here adopted by the defendant and contended for by counsel, the sending of such a message would authorize the defendants to enter and, *manuforti*, destroy the wires. The contention of the defendants is, as before stated, that the use of the word "with" in the grant confines the use of the telephone line to purposes strictly adjunct to, and in aid of, the grant of the right to lay water pipes, which was for the "transportation of water to the city of Newark in said state, and other places." For this contention counsel relies upon three adjudged cases which I will now refer to.

The first is Leeke v. Bennett, 1 Atk. 470, a decision by Lord Hardwicke, which arose out of the construction of a clause in a will as follows: "I give to my niece Elizabeth Martin, during the time of her natural life, my house on Mays Hill in Greenwich, with all the household goods that shall be found therein at the time of my decease." The estate of the testator in the house was a term of years with only 10 years unexpired. The question was whether the gift to the niece of the household goods was for life or in fee, and it was held that the word "with" so connected the household goods with the house as that the estate in those was limited in the same manner as that in the house. The Lord Chancellor relied upon the fact that the words "during her natural life" preceded the gift of the house, and remarked: "If the words 'during her natural life' had been subjoined to the devise of the house, it had not been so clear a case, though I think that would not have varied the law of the case, * * * but those words, being put before the devise, must operate equally on both parts of the subsequent devise, and the same interest passed in both. The word 'with' would have had the same effect and been considered in the same manner in the case of a grant." Here it is to be observed that the use of the house and the use of the goods consisted in substantially the same act or series of acts; unless they were separated one could not be used without the other, and the cir-

cumstance that they were not separated made the subject of the devise in effect a single one of the house and furniture. This circumstance differentiates that case from the present one. Here there was no necessity or even natural unit of use between the water pipes for carrying water from Newfoundland to Newark and the telephone line; either could be used, and were in fact used, without the other. There was nothing common in the mode of use. The telephone line was simply a convenience, and, although used as a convenience, not as a necessity, in maintaining and operating the water pipes, the actual use of each was quite distinct and dissimilar.

The next case cited is Richards v. Baker, 2 Atk. 321. That also was the construction of a will. There the testator gave his widow £2,000, to be paid in six months after his decease, and then proceeds: "I do also give and bequeath to my dear and loving wife all my household goods, furniture, plate, linen and china in my house at Edmonton wherein I now dwell or to the said house belonging, and also the said house, gardens, fields and lands thereto belonging, so long as she continues my widow, and no longer; and I likewise give her my jewels, coach, chariot and coach horses." The master of the rolls decreed the widow to leave with the master a schedule of all the several things specifically bequeathed to her during widowhood, which was the usual mode of limiting her right to a life estate. The matter came on before the Lord Chancellor on appeal, and he said that he had to determine what is the relation and extent of the words of limitation "so long as she continued a widow, and no longer;" whether they are to be confined to the house at Edmonton or to be extended to the whole, and he held that it was to be confined simply to the house and the household goods, and did not include the jewels, coach, chariot, and coach horses. Careful consideration of that case seems to me to make against the defendants rather than in their favor, for the gift of the jewels, etc., was connected with the other gift by the word "likewise," which means "in like manner," and might well be construed to mean "to the same extent." But the Lord Chancellor held otherwise. These two decisions by Lord Hardwicke illustrate the true distinction to be applied in such cases. In the one case the natural and necessary use of the furniture with the house made the two a single subject of the gift, while in the other case the jewelry, coach, chariots, and horses, though convenient, were in no sense necessary to the use of the house, and their use was entirely distinct from it. The present case falls under the latter category. Waterworks like those erected by the East Jersey Water Company had been erected and maintained many years before the invention and use of telegraphs and telephones.

The case next cited by defendants is Durham and Southern Railway Company v. Walker, 2 Adol. and Ellis, N. S. Q. B., 940, also reported in 2 Gale and Davidson, 326, 11 L. J. Ex. 442. In that case the court of Exchequer Chamber had before it on bill of exceptions and writ of error a construction put by Justice Coltman at Nisi Prius on a reservation out of a lease granted for years by the Dean and Chapter of the city of Durham to one Walker of a right in certain lands. Under that reservation the lessors had granted to the defendant the right to build an ordinary double track railway for through traffic and an action at law had been brought by the tenant for years against the persons acting under the grant. The reservation was of "woods, trees, mines, quarries, and seams of clay, and with full and free authority and power to cut down, carry away, etc., said woods and trees, and to dig and carry away the mines, quarries, etc., with free ingress, egress, and regress, way, leave, and passage to and from the same, or to or from any other mines, quarries, etc., with carts and all manner of carriages, and also all necessary and convenient ways, passages, etc., for the purposes aforesaid, and particularly laying, making, and granting wagonway or wagonways in or over the premises or any part thereof, paying reasonable damages," etc. The learned judge at Nisi Prius declared in his opinion that, if the railway was made for other purposes as well as for the carriage of coals and minerals, it was not such a road as could be made in pursuance of the exceptions and reservations contained in the indenture of demise, and he directed the jury that, if they thought the railway was so made for such other puposes as well as for the carriage of coals and minerals, then they ought to find a verdict for the plaintiff. The court of error held that that direction was not right. It held that the plaintiff could not claim for a trespass affecting his present possession of the land, it being in the occupation of a subtenant, but that it was an injury to the inheritance, or rather the portion of the term which would remain to him after the expiration of the under lease out of the term of years which was granted to him, and it used this language: "Now, if the railway is such a railway as the defendants, at the time when it was formed, might lawfully make for the purposes for which when made they might lawfully use it, the plaintiff can have no ground of complaint by reason of the intention of the defendants also to use it for other purposes for which they have no right to use it. Such an unwarranted use of the railway, if afterwards put in execution, may entitle the tenant in possession to maintain an action of trespass, but the mere intention to commit such a trespass is no injury to the reversioner, and we, therefore, think that the direction of the learned judge was incorrect. The proper question for the jury, as it appears to us, was not whether the railway was made for other purposes as well as for the carriage of coals and minerals, but whether it was such a railway as, at the time it was made, it was reasonable and proper to make for the purposes for which it was lawful to make it, and for those

purposes only." But the court then proceeds to determine what would be the proper direction on new trial. It will be observed that all reservations were there declared to be "for the purposes aforesaid," which refers entirely and exclusively to the clause giving what is called "way leave." And then after "the purposes aforesaid" follows: "and 'particularly' of laying, making and granting wagonway or wagonways," etc. Now that word "particularly" was the word upon which the case turned, and it shows clearly that the words which follow it were intended to be a mere amplification of the language which had preceded it. The court refers to the word "with" in the previous part of the reservation, and says it means as an incident merely. That is quite plain when you read it, because, as well remarked by the court, the reservation of the timber and the minerals without a right and privilege of removing them would be nugatory, and those reservations of way leave were no more than what the law would imply. The construction put upon the word "with" in that case does not seem to me to reach the present case. That case turned upon the force of the word "particularly" and not on the force of the word "with."

For the reasons I have stated, I am unable to limit the grant here in question in the manner contended for by the defendants. I am of the opinion that the word "with" has the force of the word "also" or "and," and is a mere conjunctive.

Undoubtedly the circumstance that the water company was not entitled to engage in the public service of a telegraph or telephone company, and the line was going into a region where there was no reason to suppose that there would be any public service of that sort, would naturally lead to the supposition that the telegraph and telephone line would be used for the purpose of the water company only. But against any inference from that circumstance is the very broad language of the grant itself, to which I have already alluded. It is a "telegraph or telephone line or lines" without limit in number, or any direct designation of purpose for which it was to be used, unless it be found in its immediate connection with the grant of a right of way "for all purposes." Moreover, I am of the opinion that this is a case where the rule that, before a complainant can have relief of this sort in this court, his right at law must be perfectly clear, does not apply in its full force. The complainant here is simply asking that the defendants should not enter with strong hand and destroy its property, of which it has full possession and right of possession. See, in this connection, French v. Robb, 67 N. J. Law, 260, 51 Atl. Rep. 509, 57 L. R. A. 956, 91 Am. St. Rep. 433. The case is far outside that relied upon by defendants, to-wit, Broome v. Telephone Company, 42 N. J. Eq. 141, 7 Atl. Rep. 851. There the telephone company had hardly a color of right, and the landowner was defending his possession. The effect of permitting the defendants not only to tear down the wires, which they did in this case, as before stated, but also to saw off the top of the poles, as is also charged and admitted, would be to compel the complainant either to wait for years the result of an action of trespass before enjoying the easement, or else to admit that the construction of the grant claimed by the defendants is the true one and apply for condemnation of the additional right so claimed and incur all the expense and hazard of condemnation proceedings. On the contrary, I think the rule of clear right at law ought to be applied to the man who undertakes to enforce his rights by the strong hand, and that the defendants should be enjoined from enforcing his right in that manner until he shall establish it at law. I think, therefore, that the complainant is entitled to relief in this court.

One other point made by the defendants remains to be considered. The defendants offered parol proof, and it was admitted, subject to timely objection by the complainant, to the effect that at and before the time when one or more of the original grants in this case was made, the purchasing agent of the water company stated to that particular grantor that the telephone line was to be used only for use in assisting in the construction and maintenance of the waterworks. I stated at the hearing, and I still think, not only that the evidence was incompetent as tending to vary a written instrument, but that it was not of a character to rise to the dignity of a contract or representation which affected the transaction. In this connection I refer to Chetwood v. Brittan, 2 N. J. Eq. 438, on motion for an injunction, and 4 N. J. Eq. 434, on final hearing. I dealt with that case in O'Brien v. Patterson Brewing & Malting Company (N. J. Ch.), 61 Atl. Rep. 437, at page 444, and will not repeat what I there said. I will only add that I attempted, and I think succeeded, in there drawing a distinction between the case where the parol evidence amounted to a stipulation that the instrument in question was not, under certain circumstances, to have binding effect, and one in which its effect was to vary the construction to be put by the court upon a written contract. In the latter case the rule is hard and fast that parol evidence cannot be used except in a direct proceeding to reform the contract. This element is not found in this case. Moreover, I see nothing in the evidence to lead to the conclusion that the remark made by the purchasing agent, as testified to by the witness, amounted to anything more than a casual explanatory remark, quite insufficient to maintain a bill to reform.

But if I had come to a different conclusion on this point, I should have been met by another point made by the complainant in answer thereto, namely, that it stands in the position of a *bona fide* purchaser without notice of the parol agreement. The contents of the agreement between the city, and the complainant shows a consideration passing or to pass between the two, and the complainant entered and put up its new line of poles,

and incurred other expenses on the strength of that agreement as it appears in writing, and this constitutes it a *bona fide* purchaser for value.

Upon the whole case, then, I find it necessary to adjudge and determine only this: that the defendants have no such right, adverse to that claimed by complainant, as to entitle them to enforce such right, if any, by the strong hand, and will advise a decree for an injunction.

NOTE.—*A Deed to a Water Company Confirming a Right of Way 99 Feet Wide for Water Pipes, with the Right to Set Up and Maintain Telephone Line or Lines, Does Not Confine Water Company to Lines for Exclusive Use of Water Works Plant.*—The questions in the principal case are of practical importance and it is important to note that the sole prayer of complainant's bill related to the right of defendants to enter upon the grant and destroy complainants property, of which it had possession and right of possession. There is a class of cases which holds correctly, that where a lighting company goes on the streets, when the laws are like those in New Jersey, without obtaining the consent of the owner of the soil or having a contract with the city, then there is no question of the right of the owner of the soil to proceed with a suit in ejectment, and if he proceeded with a strong hand, as in the principal case, it is difficult to see how such action could be the basis of a suit for damages, for the land owner has every right in such property, as he has in any other property he owns, except that easement which is in the public for public purposes. He can do anything with it not inconsistent with the public easement that he could with regard to his property in which there was no public easement, and if a party put poles on such property he would have a right to cut them down. But the principal case shows that a right of way had been granted, "with the right to set up, operate a telegraph or telephone line or lines thereon and with the right of ingress and egress." This seems to have been a plain and unambiguous expression of the grant to the water company which was assigned to the telephone company. It would seem plain that being in rightful possession under a grant that, whether or not the complainant had increased the burden granted was one the defendant could not determine for himself, like that where possession had been taken and poles fixed on a party's property without right. The question is not only between the parties but the interests of the public are as deeply involved. Therefore, while we think there was absolutely no question of the correct position of the court, as between the parties themselves, there was also the additional consideration and public interest calling for the injunction granted. This would give time, as the court indicates, to settle legal questions and was a method of procedure that guarded the court against embarrassment in granting the injunction. This point is a good one in all cases of this character because lawyers frequently burden their bills with embarrassing demands, to be decided off-hand, when one point properly set forth may accomplish all practical ends. This leads up naturally to the conditions of grant with respect to telephones, so we call attention to some conditions mentioned in Jones on Telegraph and Telephone Companies, sec. 78: "In granting by state to telegraph and telephone companies the right to construct and operate lines of wires across private property, along and upon highways, railroads, and along, across and under navigable waters, there are certain conditions for the welfare and convenience of the public always required of the grantees for the enjoyment of such right. For instance, in some states authority is given by statutes to all telegraph companies to erect poles upon which to erect wires, on all highways or public roads, by first obtaining consent in writing by the county board of the county in which the highway is situated (Board of Trade Tel. Co. v. Barnet, 107 Ill. 507), and that the posts, arms, insulators and other fixtures of such telegraph or telephone lines be so erected, placed and maintained as not to obstruct or interfere with the ordinary use of such highways, railroads, streets or water; or with the convenience of any land owners more than may be avoidable; or change or adjust when necessary its system of operating its telephone lines as not to curtail the enjoyment of the public of the best mode of travel and transportation (Miss. Laws 1886, p. 93; Cincinnati Incline Plane R. Co. v. Telephone Assn., 48 Ohio St. 390, 29 Am. St. Rep. 559, 12 L. R. A. 534, 27 N. E. Rep. 890); or not to interfere with the opening and closing of a drawbridge across a navigable stream, nor obstruct streams or travel upon navigable waters. And these companies must always first make compensation for the damages and injuries inflicted upon the owners of the fee or right of way, or they would be taking the property of others without compensation (Pac. Mut. Tel. Co. v. Chicago, etc., Bridge Co., 36 Kan. 113, 12 Pac. Rep. 535; Board of Trade Tel. Co. v. Barnet, *supra*), otherwise some person, as in the principal case, will consider himself agrieved and proceed with a strong hand." The numerous cases recently which have brought about suits against companies, where their employers have failed to recognize these private rights, shows the importance of a careful instruction to the employers of property owners' rights.

JETSAM AND FLOTSAM.

SHALL SUBORDINATE COURTS DECLARE LEGISLATIVE ACTS UNCONSTITUTIONAL.

A most interesting question is presented by the movement originating among railway employees, as a consequence of the holding by several circuit courts of the United States that the Employers' Liability Act of June 30, 1906, is unconstitutional, to withdraw from every court except the supreme court the right to determine the constitutionality of an act of congress.

That such a statute, if itself constitutional, would correct a most deplorable evil, we have no doubt, That a single judge of an inferior court, perhaps in a trivial case and upon inadequate argument, should be clothed with the power to determine the validity of an act of congress, seems absurd, and we doubt if such a power is exercised by the subordinate judiciary of any other constitutional country. Inferior courts have not, as a fact, been clothed, neither by the constitution or by law, with that power, but have assumed it, in the absence of a positive prohibition. It might be said that this is also true of the exercise of such power by the supreme court itself, but its exercise by the higher body was a matter of necessity, growing out of the failure of the constitution to designate any other body to determine whether congress had exceeded, in enacting a particular law, its delegated powers.

Recently we called attention to the fact that in the

constitutional convention, it was sought to specifically confide this power in the supreme court, but the measure was voted down by a heavy majority. The presumption, on this state of facts, is that the convention intended that the congress should itself be the judge of its own powers. However this may be, the supreme court early in its history assumed to determine the constitutionality of the acts of congress, and its action has been acquiesced in for more than a century, so that it may be regarded as finally settled that the power will always be exercised by the supreme court.

But the necessity from which the exercise of this power by the supreme court arose, does not exist in the case of the subordinate courts. Moreover, they are the creatures, not of the constitution, but of statute; their powers and jurisdiction are prescribed by the power which created them, and may be taken away by the same power. The only provision found in the constitution with reference to them is that referring to tenure of office during good behavior. Their jurisdiction is limited as to persons and subject matters; has not congress the same power to limit the manner in which they shall exercise that jurisdiction, by withdrawing from their cognizance the determination of the validity of its acts, and restricting that power to the supreme court alone?

It will doubtless be said that the power to determine the validity of an act of congress is inherent in all courts which are called upon to enforce those acts; that an unconstitutional law is no law at all, and that every court must determine, before it undertakes to enforce a law, that it is a valid law. That argument, it seems to us, is good when urged on behalf of the supreme court, which, by implication, at least, is clothed with the right to determine whether congress has exceeded its powers, but not when urged on behalf of inferior courts created by congress which by the very law creating them, would be forbidden to pass upon such questions.

So far as we have been able to ascertain, on a hurried search, no attempt has ever been made to restrict the power of courts of inferior jurisdiction to pass upon the validity of acts of the legislature, and the courts themselves at an early day assumed this right and have continued to exercise it, without protest from either legislature or supreme court. The supreme court of Michigan, in an early case, held that a justice of the peace should not attempt to pass upon the constitutionality of a statute (Ortman v. Greenman, 4 Mich. 291), but it is difficult to perceive any ground upon which a justice of the peace has not as good right in law to do so as a circuit court.

Of the mischiefs flowing from the present practice, there can be no question. Guilty criminals are released from punishment because a single judge, hrough deficiency of judgment or improper motives, sees fit to declare the statute under which they are indicted unconstitutional, and it is only after some other case founded upon the same statute reaches the supreme court, perhaps years afterwards that the question is finally determined properly. In the meantime, the ill-advised decision may have been the cause of other similar miscarriages of justice. We believe that the last congress passed the law recommended by the president, giving the government a right of appeal as to questions of law in criminal cases, without, however, affecting the verdict of acquittal, and this will enable the government to minimize existing evils by procuring an authoritative decision on any constitutional question involved in a case. It would be much better, however, to take the decision of such questions away entirely from the trial courts.—*National Corporation Reporter.*

A SPANISH OBJECT-LESSON IN CODE-MAKING.

The nineteenth century bids fair to be remembered as the age of codification (or rather re-codification) of the civil law. Commencing in 1804 with the Napoleonic civil code, which, it is increasingly apparent, affords the most enduring monument to the genius of the ill-fated Corsican, the century closed with a parallel achievement in the promulgation of the code which marked the unification of substantive law for the German Empire. Between these two great landmarks appeared other codes of lesser fame—such as that of Bogisic the law giver of Montenegro—and one which, though little known to American lawyers, and still less to American legislators, may yet exercise a stronger influence upon American jurisprudence than any of its contemporaries.

The *Codigo Civil* is the late ripening flower of Spanish juridical evolution. By a strange coincidence this product of Hispanic genius appeared in the centennial year of the French revolution and of the events that mark the first practical workings of the great land-mark of American public law—the federal constitution. But the code formally promulgated in 1889 was the outcome of a movement begun more than three-quarters of a century previous and stimulated by still earlier efforts at codification on the part of Spanish jurists. With the possible exception of Italy no nation indeed has an ampler juridical background. But Spanish codification preceded Italian, for the earliest Spanish code (*Siete Partidas*) based largely on the law of Rome, appeared soon after the middle of the thirteenth century, while in Italy the revived study of the Roman law had begun only with Irnerius at Bologna in the century preceding. Other codes of superior merit were produced in Spain from time to time, such as the *Ordenamiento de Alcala* in 1348, and the *Leyes de Toro* of 1505.

But the defect of these codes as of the Spanish legal systems generally, was lack of universality. The ancient petty kingdoms which were gradually merged into the Spanish monarchy retained, for the most part, each its own system of laws. A code of Castile, however excellent in form and contents, might have no force in Catalonia. Indeed at and prior to the beginning of the nineteenth century no less than six diverse juridical systems prevailed in various parts of Spain and the result, in the language of the learned Spanish jurist, Sanchez Roman, *Estudios de Derecho Civil* (Studies in Civil Law), Madrid, 1890, p. 500, was "the most anarchical multiplicity, the greatest lack of harmony with historic reality, vagueness, uncertainty and the most complete chaos."

It is clear that this condition presented a problem more serious even than that which confronted the French law reformers of the first national assembly, or those who framed the code Napoleon fifteen years later. The diversity and confusion in the law of pre-revolutionary France was great, but not so great as that of Spain at the corresponding period. Besides the Spaniards are a more conservative people and the different regions of the peninsula cling more tenaciously to their peculiar "*fueros*" and customs.

The situation was rather more analogous to that which prevails today in the states of the American Union. Except in Louisiana we have as the basis of our jurisprudence the English common law. But the whole tendency of our federal system, with the increase in the number of states, in legal theory sovereign and foreign to each other, has been toward juridical diversity. A legislature, supreme in its own

sphere, sending forth new statutes year after year—a court of last resort, independent of every other, constantly making new precedents with the courts of law—such are the forces at work in each of our nearly half a hundred states to develop a system of jurisprudence of its own. Even our law schools accelerate this tendency, for each naturally lays particular stress on the law of the state of its location. If not already so, will not the words of the Spanish jurist above quoted soon be applicable to the condition of our American law? No active practitioner any longer attempts to keep abreast of the jurisprudence of any state but his own. In entering the courts of another he is on ground almost as strange as if he were practicing in a foreign country.

It is of course not merely or mainly the professional class that suffers from this condition. In these days of enterprises conducted on a national and even international scale, it is the business interests which must ultimately feel most keenly the inconvenience of subjection to fifty diverse juridical systems in one country. Hence the inspiration of such efforts as that toward the adoption of a uniform statute on negotiable instruments which is nothing more or less than a movement for the codification of one branch of the commercial law. Is it not worth while in this connection to follow the course of another nation, which under somewhat similar conditions, has codified not alone its commercial, but its entire body of law?

It was this chaotic condition of her jurisprudence that hung like an incubus over Spain in the opening years of the nineteenth century. In that period, as the author already quoted observes, began "a series of events, of diverse character, realized under distinct initiative and with variety of result, but all inspired and caused by a single thought—the codification of our civil law." The movement found clear expression in the Cadiz constitution of 1812, the instrument which marks the real beginning of Spain's modern constitutional history. That instrument, voicing aspiration rather than announing actuality, declared: "*unsolo Codigo Civil regira en todos los dominios de la monarquia espanola*" (one civil code only shall be in force throughout the dominions of the Spanish monarchy). The same Cortes which framed the constitution adopted, as early as February, 1811, a proposal presented by the deputy Espiga y Gadea, for undertaking as soon as practicable the codification of the Spanish law in all important branches including civil, penal and remedial. In 1813 the code commission composed of five distinguished Spaniards was appointed by the same body, but the reaction of the following year prevented any real results, and a second commission named in 1821, met a similar fate. The movement now passed for a time from official into private hands and several drafts or projects appeared from time to time, one being presented to the Cortes in 1839. In 1843 a royal decree was issued naming a general code commission of twenty-four under which the work of codification was well started, but which was succeeded three years later by a smaller commission which completed its labors in the form of a draft of a civil code in 1851.

The instrument thus framed after forty years of effort marks an epoch in the history of Spanish jurisprudence. While open to criticism in respect to classification and terminology, it contained many new features borrowed from foreign sources, and showed that its framers were diligent students of comparative legislation. Not only did they make use of the jurisconsults and commentators, but the code Napoleon supplied many ideas, like the institution of the family council, which were thus introduced into Spanish law for the first time. But the new project also in some features followed closely the law of Castile and this was one of the causes of opposition. Partly by reason of this and partly because the reason of the country was not ready for the great reform, the project of 1851, like its predecessors, was to remain unrealized in existing form. In the period which followed, the reformers devoted themselves to the codification of specific branches of the law, such as the mortgage law, the notarial law, the law of waters, etc., much as our law reformers are now attempting to secure the enactment of a uniform statute governing divorce and another pertaining to negotiable instruments. This kept alive interest in the subject and paved the way for greater results. Finally in 1880 a Royal decree was issued providing for a general codification of the Spanish law on the basis of the draft of 1851, and naming a commission of eminent jurists to undertake the task. Two circumstances, both highly suggestive, now favored the successful consummation of the movement. In the first place each member of the commission was chosen from one of the several regions into which the peninsula was judicially divided. This favored the selection of the best features of each, tended to prevent the undue preponderance of any, and encouraged the harmonizing of differences. Another aid was the calling of juridical congresses in these different regions and the consideration by them of those features of the local law which most deserved incorporation into a national code. Such congresses were held at Saragossa in 1880, and Madrid in 1886, and at Barcelona in 1888, and the programs, practical and yet scientific, were highly instructive and helpful. Opposition had not disappeared and the exigencies of Spanish politics tended to delay the consummation. But in 1885, the distingushed jurist Silvela was Minister of Grace and Justice and he obtained the authority of the Cortes to publish a civil code framed on a new basis, but utilizing the work of previous years. This project, after exhaustive discussion and approval by both chambers of the Cortes, received the royal assent on May 11, 1888, and became substantially the law of all Spain on May 1, 1889, exactly nine years before the tragic battle of Manila Bay. In Catalonia and Aragon its force is still somewhat qualified; in a few other provinces the old *fueros* still remain. On July 31, the new code was extended to Cuba, Puerto Rico and the Philippines where, with some slight modifications, it has ever since remained in force. Strange irony of fate that led the Spanish lawmakers to legislate so minutely and elaborately for the Colonies which they were so soon to lose! Fortunate event which gave to each of these regions, on the eve of a new and then unexpected career, a system of laws fitted to conditions both old and new, yet embodying the best results of juridical experience and scientific thought!

Of the instrument brought into existence by this long and laborious process only a brief and inadequate mention is permissible here. Its real and historic basis, even more than that of the *Siete Partidas*, is the Roman law of the Golden Age and it comprehends the subjects of persons, property and obligations in the same order and with much the same phraseology as the Institutes of Justinian. The subject of the fourth book of the Institutes, relating to actions, is rightly omitted, however, because as a *Codigo Civil* this instrument includes only private substantive law, or that which treats of the rights and obligations of

individuals *inter se*, and is not concerned with remedial law, including actions, which deals with the methods of enforcing such rights and duties.

Doubtless the Spanish codifiers profited much from the code Napoleon, but we have it on the authority of the eminent French jurist Leve, that the Spanish code is the superior. When it first came to the attention of critical American judges and lawyers in our new possessions they were amazed at its comprehensiveness and completeness—charmed with its clearness, conciseness and simplicity, They, who were wont to engage in the tedious and reason stifling process of pursuing, through the maze of precedent, with the lame assistance of cumbrous digests, voluminous treatises and multitudinous reports, some fine point in the law of contracts or real property, found in this brief Spanish code, smaller than almost the least of American text books, a logically arranged group of principles from which the law applicable to a given case could be deduced rationally and with little difficulty. Coming at an epoch when business interests as well as the legal profession are beginning to demand relief from

"The lawless science of our law
The codeless myriad of precedent,"

this discovery of the achievement of the hitherto unappreciated Spaniard is most timely and serviceable. It is one of the far-reaching consequences of the Spanish-American war which was never forseen and is even now little suspected. Much has been said and rightly of the improvements of the courts of our insular possessions through the introduction of the simpler and more practical American system of procedure. The benefits will not be altogether one-sided if through this contact of legal systems the American people shall learn the merits of the Spanish *Codigo Civil* and from it the feasibility and gain of codifying their private substantive law.

CHARLES SUMNER LOBINGIER, PH. D. LL.M.,
U. S. Judge of the Court of First Instance, Philippine Islands.—*Yale Law Journal.*

BOOK REVIEWS.

THE ACT TO REGULATE COMMERCE.

The above is the title to Mr. Charles S. Hamlin's book with regard to the Amended Act of Congress which shows work and care in the preparation. The indexing is excellent, a great commendation to any work; the annotations are full. There is also included in this work the Carriers' Liability Act, Safety Appliance Acts, Act Requiring Reports of Accidents, Arbitration Act and the Sherman Anti-Trust Act and others. It is nothing more nor less than a concordance so will prove to be a labor saver. The laws with reference to interstate commerce are getting to be so numerous and follow so hard one upon the other, that an author will hardly have finished his additions before he is called upon for still another. This field has been a prolific source of authors, so, there should be no excuse for a lawyer not to be well informed on any subject relating thereto. In the way of indexing Mr. Hamlin's work surpasses anything we have seen and it will no doubt be very popular for this very reason.

It is published by Little, Brown & Company, Boston. Well bound in buckram.

HUMOR OF THE LAW.

This is from the pen of Du Query, an eminent Irish barrister of the generation of John P. Curran.

Judge Dey (Day) was holding court in Dublin, and on account of the business moving slowly and the calendar congested, proposed holding night sessions. No sooner had the proposition forth than Du Query pencilled the following, and passed it up to the Bench:

"Try men by night, my Lord forbear,
Think what the wicked world will say.
Methinks I hear the rogues declare
That justice is not done by Dey."

It was an old Virginia judge, who, when the lawyers had summed up for plaintiff and defendant, respectfully charged the jury: "Gentlemen of the jury, if you believe what the lawyers for the plaintiff have told you you must find for the plaintiff. If you believe what you have heard from the lawyers for the defendant, you must find for the defendant. But if you are like I am, and don't believe a dam word either have told you, I don't know what the hell you will do."—*Green Bag.*

In a western town H was defending a physician in a suit brought by a negro who wanted damages, his wife having died shortly after an operation.

When it came his turn to cross-examine the plaintiff, he asked, "Mr. Wilson, how old was your wife when she died?"

"About forty-five, sir."

"Been in feeble health a long time, had she not, Mr. Wilson, and cost you a great deal for medicine and help?"

"Yes, sir."

"You have married again, have you not?"

"Yes, sir."

"How old is your present wife?"

"About thirty-five, sir."

"Is she stout and healthy, Mr. Wilson?"

"Yes, sir."

"Then, Mr. Wilson, will you please state to this jury how you are damaged in this case?" Mr. Wilson could make no answer. The good and true men thought he had made rather a good thing by his bereavement.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

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1. ABDUCTION—Parent's Consent.— One charged with the abduction of a child in violation of Revisal 1905, § 3358, has the burden of establishing the defense that the carrying away of a child was with the father's consent.—State v. Burnett, N. Car., 55 S. E. Rep. 72.

2. ADVERSE POSSESSION—Color of Title.—Actual possession of a part of a tract under color and claim of title to the whole is, in general, possession of the whole as to lands of the commonwealth as against persons not lawfully claiming under it.—Green v. Pennington, Va , 54 S. E. Rep. 877.

3. ADVERSE POSSESSION— Constructive Possession.—Adjacent owners may be in constructive possession of the same land, being included in the boundaries of each tract.—Harriss v. Howard, Ga., 55 S. E. Rep. 39.

4. ADVERSE POSSESSION—Railroad Right of Way.—The successor of a railroad company held to have acquired color of title to the full width of 200 feet, though the instrument of conveyance merely described it as the grantor's "right of way."—Bennett v. Atlantic Coast Line R. Co , Ga., 55 S. E. Rep. 177.

5. ALIENS—Deportation Proceedings.—In Chinese deportation proceedings, it was not error for the judge to cause defendant accompanied by his counsel to be brought before him after the hearing and to examine defendant concerning the evidence.—Lee Yuen Sue v. United States, U. S. C. C. of App., Ninth Circuit, 146 Fed. Rep. 670.

6. APPEAL AND ERROR—Dismissal.—Where a case has been brought up by a direct bill of exceptions, no motion for new trial having been made, and no brief of evidence filed, and error is assigned on specific rulings on evidence, and it does not appear that the verdict was necessarily controlled by any of such rulings, it cannot be reviewed.—Anderson v. Wyche, Ga., 55 S. E. Rep. 19.

7. APPEAL AND ERROR—Harmless Error.—A party cannot complain of the sustaining of an objection to a juror, where at the time he had not exhausted his peremptory challenges, and the jury chosen constituted a panel acceptable to both parties.—Ives v. Atlantic & N. C. R. Co., N. Car., 55 S. E. Rep. 74.

8. APPEAL AND ERROR—Questions Not Raised Below.—Where a petition does not raise a distinct question brought to the attention of the supreme court, and it does not appear that it was passed on below, it will not be reviewed on error. — Virginia-Carolina Chemical Co. v. Provident Sav. Life Assur. Soc., Ga., 54 S. E. Rep. 929.

9. APPEAL AND ERROR—Special Appearance.—Where a motion to dismiss an action for irregularities is denied, defendant may proceed with the trial without losing his right to have the ruling reviewed on appeal.—Woodard & Woodard v. Tri-State Milling Co., N. Car., 55 S. E. Rep. 70.

10. ASSAULT AND BATTERY—Defense of Property.—The right to protect person or property by force as may be necessary is subject to the qualification that human life must not be endangered or great bodily harm threatened except in urgent cases.—State v. Scott, N. Car., 55 S. E. Rep. 69.

11. ASSIGNMENTS—Action by Assignee.—Where one assigns his entire salary earned for a named period, it is not necessary for the assignee to go into equity to recover the amount thereof from the assignor's employer.—Western Union Telegraph Co. v. Ryan, Ga., 55 S. E. Rep. 21.

12. ASSIGNMENTS—Check on Bank as Assignment of Funds.—Both at the common law and under the New York Statute a check does not operate as an assignment of funds on deposit to the credit of the drawer in the bank against which the check is drawn until it has been accepted or certified by the bank.—Bowker v. Haight & Freese Co., U. S. C. C., S. D. N. Y., 146 Fed. Rep. 257.

13. BANKRUPTCY — Authority to Administer Oath. — Under Bankr. Act, ch. 541, a referee in bankruptcy held authorized to administer an oath to a witness including the bankrupt appearing to testify in support of a claim filed against the bankrupt's estate.—United States v. Simon, U. S. D. C., N. D. Wash., 146 Fed. Rep. 89.

14. BAIL—Habeas Corpus.—Where petitioners in *habeas corpus* had been convicted of violating a city ordinance and sentenced, the court properly refused in its discretion to release them on bail pending error to the refusal to discharge them on *habeas corpus*.—Schuler v. Willis, Ga., 54 S. E. Rep. 965.

15. BANKRUPTCY— Concealment of Assets.—Evidence considered and held to justify a finding that bankrupts had concealed assets, consisting of money drawn from the bank shortly prior to their bankruptcy, and an order requiring them to turn the same over to their trustee.—*In re* Weinreb, U. S. C. C. of App., Second Circuit, 146 Fed. Rep. 243.

16. BANKRUPTCY—Contingent Liabilities.—The liability of a bankrupt indorser on commercial paper which did not become absolute until after the filing of the petition is a debt founded upon a contract, and provable in bankruptcy thereunder after such liability has become fixed and within the time limited for proving claims.—*In re* Smith, U. S. D. C., D. R. I., 146 Fed. Rep. 328.

17. BANKRUPTCY—Embezzlement.—A motion to commit the treasurer of a bankrupt corporation for contempt for failure to obey an order of the referee requiring him to turn over money to the trustee will not be considered where he is under bail to appear and answer to indictments in the state courts for the embezzlement of such money from the corporation until after such indictments are disposed of.—*In re* Hooks Smelting Co., U. S. D. C., E. D. Pa., 146 Fed. Rep. 336.

18. BANKRUPTCY—Fraudulent Transfer of Property.—Evidence reviewed in a charge to the jury in an action by a trustee in bankruptcy against the bankrupt and another to recover the value of money and property alleged to have been fraudulently transferred by the bankrupt to his codefendant and to others through a conspiracy between defendants.—Murray v. Joseph, U. S. D. C., S. D. N. Y., 146 Fed. Rep 260.

19. BANKRUPTCY—Landlord and Tenant.—Where notice to quit was served on a corporation tenant, its subsequent adjudication as a bankrupt did not affect the efficacy of the notice, or necessitate a reservice upon the trustees in bankruptcy who took only the rights of the bankrupt at the time of the adjudication.—Lindeke v. Associates Realty Co., U. S. C. C. of App., Eighth Circuit, 146 Fed. Rep. 630.

20. BANKRUPTCY— Partnership. — A conveyance by a partner of his individual property although with intent to prefer a firm creditor, does not constitute an act of bankruptcy by the firm, and will not sustain proceedings in bankruptcy against the partnership.—Hartman v. John Peters & Co., U. S. D. C., M. D. Pa., 146 Fed. Rep. 82.

21. BANKRUPTCY—Petition to Review Order of Referee. —An order of a district court in bankruptcy dismissing a petition to review an order of a referee, filed 50 days after such order was made, for unreasonable delay, held within the discretion of the court.—Bacon v. Roberts, U. S. C. C. of App., Third Circuit, 146 Fed. Rep. 729.

22. BANKRUPTCY—Preferences.—Transfers by a bankrupt to certain banks while he was insolvent, and just prior to the filing of an involuntary bankruptcy petition against him, held void.—*In re* Gesas, U. S. C. C. of App., Ninth Circuit, 146 Fed. Rep. 734.

23. BANKRUPTCY — Priority of Claims.— A judgment against a bankrupt which was a lien on certain real estate of which the bankrupt's father died seised, and out of which the fund to be distributed arose, held entitled to priority.—*In re* L'Hommedieu, U. S. C. C. of App., Second Circuit, 146 Fed. Rep. 709.

24. BANKRUPTCY—Validity of Lien.—The estoppel of a bankrupt to deny the validity of a lien on his property does not affect his trustee where such a lien was voidable by his creditors.—*In re* Shaw, U. S. D. C., D. Maine, 146 Fed. Rep. 273.

25. BANKS AND BANKING—Banker's Lien.—A banker's lien given by Rev. St. Idaho 1887, § 3448, held not to cover stocks of goods or property not usually taken in the actual possession of banks in the ordinary course of business.—*In re* Gesas, U. S. C. C. of App., Ninth Circuit, 146 Fed. Rep. 134.

26. BANKS AND BANKING—Collections.—In an action by a bank on a check not collected by the negligence of defendant collecting bank, a telegram sent by plaintiff to the latter informing it that all responsibility would fall on defendant and the drawee bank held admissible.—Bank of Rocky Mount v. Floyd, N Car., 55 S. E. Rep. 55.

27. BANKS AND BANKING—Misapplication of Funds.—Where an officer of a national bank is charged in an indictment with the fraudulent misapplication of its funds in the payment of several and distinct notes, each payment constitutes a separate misapplication and must be charged to a separate count.—United States v. Martindale, U. S. D. C., D. Kan., 146 Fed. Rep. 280.

28. BANKS AND BANKING—Payment on Forged Check.—A bank paying out a depositor's money on a forged check cannot cast on the depositor the duty of seeking to recover it from the person receiving it.—Yarborough v. Banking & Trust Co , N. Car. 55 S. E. Rep. 296.

29. BILLS AND NOTES—Anomalous Indorsement.—In the federal courts the liability of a person writing his name on the back of a note before it is indorsed by the payee is that of a joint maker or guarantor.—Columbia Finance & Trust Co. v. Purcell, U. S. C. C., E. D. Penn., 146 Fed Rep. 85.

30. BOUNDARIES—Conflicting Calls.—Distance is not necessarily required to yield to a course where one or the other must be disregarded in the determination of a boundary line.—Green v. Pennington, Va., 54 S. E. Rep. 877.

31. CARRIERS—Authority of Conductor to Employ Help.—The conductor of a freight train held without authority to employ plaintiff to work on his train or to work his passage to another place, and hence the carrier owed plaintiff neither the duty owing to a passenger nor employee.—Vassor v. Atlantic Coast Line R. Co., N. Car., 54 S. E. Rep. 849.

32 CHATTEL MORTGAGES—Selling Mortgaged Property.—Taking mortgaged chattels into a foreign state and pawning them held a violation of Cr. Code 1902, § 337.—State v. Haynes, S. Car., 55 S. E. Rep. 118.

33. CHATTEL MORTGAGES — Validity of Unrecorded Mortgage.—Unrecorded chattel mortgages on the property of a bankrupt held void as against his trustee as fraudulent attempts to create secret liens and also under Rev. St. Me. ch 93, § 1, for want of record or the delivery and retention of possession by the mortgagees.—*In re* Shaw, U. S. D. C., D. Me., 146 Fed. Rep. 278.

34. CONSPIRACY—Criminal Prosecution.—Letters held admissible in evidence, on the trial of defendants, charged with conspiracy to defraud the United States, in relation to contracts for public work, as tending to show an outside business association and intimacy between defendants and their alleged co-conspirator, who was the government engineer in charge of the public work.—United States v. Greene, U. S. D. C., S. D. Ga., 146 Fed. Rep. 787.

35. CONSTITUTIONAL LAW—Delegation of Legislative Powers.—The provisions of the sundry civil appropriation act of June 4, 1897, ch. 2, 30 Stat. 34 [U. S. Comp. St. 1901, p. 1540] making it a criminal offense to violate any rule or regulation which should thereafter be made by the Secretary of the Interior under the power therein conferred (since transferred to the Secretary of Agriculture) for the protection of forest reservations is void as an attempted delegation of legislative power to an administrative officer.—United States v. Matthews, U. S. D. C., E. D. Wash., 146 Fed. Rep. 306.

36. CONSTITUTIONAL LAW—Retrospective Statutes.—Revisal 1905, § 1591, is constitutional as a retrospective act, and, where a testater died in 1896, and special proceedings were had by a devisee for sale of the land devised to her, a conveyance of such interest pursuant to a decree passed a good title.—Anderson v. Wilkins, N. Car., 55 S. E. Rep. 272.

37. CONSTITUTIONAL LAW—Unjust Discrimination.—24 St. at Large, p. 441, exempting Confederate veterans who enlisted "from the state" from any license for carrying on any business is unconstitutional as unjust discrimination —City of Laurens v. Anderson, S. Car., 55 S. E. Rep. 136.

38. CONTRACTS—Consideration.—A contract in consideration of past cohabitation to support the woman and children begotten during the cohabitation is not void.—Burton v. Belvin, N. Car., 55 S. E. Rep. 71.

39. COPYRIGHTS—By-Laws.—The copyright of a system of by-laws for the organization of mutual burial associations held not to confer on the owner of the copyright the exclusive right to operate under the plan disclosed.—Burk v. Johnson, U. S. C. C. of App., Eighth Circuit, 146 Fed. Rep. 209.

40. COPYRIGHTS — Infringement.—The compiler and publisher of a directory while he may not copy and reprint matter from a prior copyrighted directory as his own may use the same for checking up his own canvass, independently made, and where discrepancies are found, after an honest and personal investigation of the same, may publish the result as so verified as his own.—Hartford Printing Co. v. Hartford Directory & Publishing Co., U. S. C. C., D. Conn., 146 Fed. Rep. 382.

41. CORPORATIONS—Ratification of Unauthorized Contract.—The acceptance by the directors of a corporation of a proposition for a purchase of its stock, secured by a broker, held to constitute a ratification of a contract with the broker for commissions made by the secretary of the corporation without authority.—Bauersmith v. Extreme Gold Min. & Mill. Co., U. S. C. C., W. D. Pa., 146 Fed. Rep. 95.

42. CORPORATIONS—Torts of Agent.—A corporation is not liable for the malicious acts of its agent unless such acts were authorized or were within the scope of his duties or were a violation of the duty owed by the corporation to the party injured, or were ratified by the corporation.—Southern Ry. Co. v. Chambers, Ga., 55 S. E. Rep. 37.

43. COSTS—Apportionment.—In federal courts sitting in equity the court's discretion to give or withhold costs, or to apportion the same, should be exercised, not arbitrarily, but with reference to general principles of equity, and the special circumstances in each case.—Kell v. Trenchard, U. S. C. C. of App., Fourth Circuit, 146 Fed. Rep. 245.

44. COURTS—Entry of Judgment.—The judge cannot, upon an *ex parte* application of a stenographer, render judgment in his favor against a party in an action, in which he has taken down the proceedings, for the amount of the stenographer's bill for a transcript of the evidence and charge.—Seaboard Air-Line Ry. v. Memory, Ga., 55 S. E. Rep. 15.

45. CRIMINAL EVIDENCE—Foot Tracks.—It is competent for witness in describing a foot track to describe the peculiarities by reference to the shoe of accused.—State v. Langford, S. Car., 55 S. E. Rep. 120.

46. CRIMINAL EVIDENCE—Letterpress Copy of Letter.—A letterpress copy of a letter purporting to have been written by the person in whose possession it was found, and shown to be in his handwriting, held admissible to show his state of mind on the trial of defendants, charged as co-conspirators with him.—United States v. Greene, U. S. D. C., E. D. Ga., 146 Fed. Rep. 784.

47. CRIMINAL EVIDENCE—Presumption From Failure to Produce Witness.—Where a charge as the presumption from failure to produce evidence was calculated to create an impression that such presumption would arise when the accused relied only upon his statement, if it appeared that there was an eyewitness it was erroneous.—Long v. State, Ga., 54 S. E. Rep. 906.

48. CRIMINAL LAW—Judicial Notice.—The court will take judicial notice that the territory now embraced in

Crisp county was, before the creation of that county, within the boundaries of Dooly county, wherein the sale of intoxicating liquors was prohibited by law.—Moore v. State, Ga., 55 S. E. Rep. 827.

49. CRIMINAL TRIAL—Absence of Witness.—Where a subpœna could not be served because the witness had left the county, the accused held entitled on proper and timely motion, to time to secure the presence of the witness, or to continuance.—Rumsey v. State, Ga., 55 S. E. Rep. 167.

50. CRIMINAL TRIAL—Continuance.—Where an applicant for a continuance fails to show that his application is not for delay, the court does not abuse its discretion in overruling the application.—Jones v. State, Ga., 55 S. E. Rep. 171.

51. CRIMINAL TRIAL — Mode of Arrest.—Whether one who arrested a person accused of gaming was a lawful officer or not is no ground for acquitting the accused.—Mitchell v. State, Ga., 54 S. E. Rep. 931.

52. CRIMINAL TRIAL—Sufficiency of Indictment.—Failure of the foreman of the grand jury to mark on the bill the names of the witnesses sworn and examined before the grand jury as required by Code 1883, § 1742, is not ground for a motion to quash the indictment or in arrest of judgment.—State v. Sultan, N. Car., 54 S. E. Rep. 841.

53. DAMAGES—Cost of Railroad Ticket.—Cost of ticket held an element of damage in action against carrier for failure to stop and take on passenger.—Caldwell v. Atlantic Coast Line R. Co., S. Car., 55 S. E. Rep. 131.

54. DEATH—Liability of Shipowner.—Where two vessels in collision belonged in the state of Delaware, the liability of their owners for death of passengers or crew was governed by the Delaware laws.—The Hamilton, U. S. C. C. of App., Second Circuit, 146 Fed. Rep. 724.

55. DEEDS—Alteration.—Where the name of the grantee in a deed was changed before registration without the knowledge of the grantor to the original grantee's wife, the deed never having been delivered by the grantor to the wife, it was invalid to pass title to her.—Perry v. Hackney, N. Car., 55 S. E. Rep. 289.

56. DEEDS—Construction.—A deed conveying a right of way "and all the appurtenances of said right of way" does not include the remainder of the strip not embraced within the description of the deed.—Moss v. Chappell, Ga., 54 S. E. Rep. 968.

57. DEEDS—Filling in Blanks.—Where the name of the grantee in a deed was left blank, the vendee did not invalidate it by subsequently writing his own name in the blank.—Burk v. Johnson, U. S. C. C. of App., Eighth Circuit, 146 Fed. Rep. 209.

58. EASEMENTS — Railroad Right of Way.—A railroad company owning a right of way held entitled to judge of the necessity and extent of the use of the right of way as against a person in possession thereof.—Seaboard Air Line R. Co. v. Olive, N. Car., 55 S. E. Rep. 263.

59. EJECTMENT—Priority of Deed.—Whether the deed from the common grantor under which defendant claims was a security deed or an unconditional deed, if it was senior in point of execution as well as of record to that under which plaintiff claims, it defeats a recovery by plaintiff.—Hamilton v. Rogers, Ga., 54 S. E. Rep. 926.

60. EJECTMENT—Title of Plaintiff.—Where parties to action for recovery of land, claim under a common grantor, plaintiff need not show title in such person.—Brinkley v. Bell, Ga., 55 S. E. Rep. 187.

61. EJECTMENT—Title Out of State.—In an action to recover land, in which defendant admitted that plaintiff owned all land on one side of a boundary line plaintiff was not bound to prove title out of the state.—Williamson v. Bryan, N. Car., 55 S. E. Rep. 77.

62. EQUITY—Accounting.—Where the remedy at law and the remedy in equity involve an accounting, and the consideration of many items, the remedy in equity is more complete and better adapted to attain the ends of justice than the remedy at law.—Castle Creek Water Co. v. City of Aspin, U. S. C. C. of App., Eighth Circuit, 146 Fed. Rep. 8.

63. EXECUTORS AND ADMINISTRATORS—Accounting.—An administrator in an action for a final settlement has the burden of showing that he used due diligence to collect debts and having collected the same, has accounted therefor.—Mann v. Baker, N. Car., 55 S. E. Rep. 102.

64 EVIDENCE—Admissions.—A declaration made by the personal representative of a decedent which is germane to the issue involved in a suit brought by him, is competent against him.—Bennett v. Best, N. Car., 55 S. E. Rep. 84.

65. EVIDENCE—Maps.—A paper purporting to be a map of the subdivision of land is not admissible in evidence unless it was made by some officer authorized to make the survey, or there is evidence as to its genuineness and correctness.—Bower v. Cohen, Ga., 54 S. E. Rep. 918.

66. EVIDENCE—Parol Negotiations as to Insurance Policy.—A policy executed and delivered held to merge all parol negotiations, understandings, and agreements, which could therefor not be proved by parol.—Kentucky Vermilion Mining & Concentrating Co. v. Norwich Union Fire Ins. Soc., U. S. C. C. of App., Ninth Circuit, 146 Fed. Rep. 695.

67. EVIDENCE—Res Gestæ —Where a brakeman was knocked from the top of a car by a water spout, his statements within a very short time explaining the manner in which he was hurt, were admissible as part of the *res gestæ*.—Southern Ry. Co. v. Brown, Ga., 54 S. E. Rep. 911.

68 EXECUTORS AND ADMINISTRATORS—Notice of Distribution —The fact that a notice of proposed distribution of an estate is styled "appellant's heirs at law" instead of "devisees or legatees" does not affect its validity.—Brown v. Brown, S. Car., 54 S. E. Rep. 838.

69. FIRE INSURANCE—Mode of Signing Policy.—The proper place for the signature to a policy of fire insurance is at the end of the matter which it attests, but it will suffice if, with the intent to constitute a signing, the signature is inserted in another place.—Delaware Ins. Co. v. Pennsylvania Fire Ins. Co., Ga., 55 S. E. Rep. 330.

70. FRAUDS, STATUTE OF—Administrator's Sale.—No memorandum in writing is necessary to charge either the administrator or the purchaser at any administrator's sale.—Green v. Freeman, Ga., 55 S. E. Rep. 45.

71. FRAUDS, STATUTE OF—Contract in Writing.—On a sale of growing timber without a valid written contract, partial payment of the price unaccompanied by possession will not take the case from the statute of frauds.—Corbin v. Durden, Ga., 55 S. E. Rep. 30.

72. FRAUDS, STATUTE OF—Contract to Cut Timber.—An oral contract whereby one of the parties agreed to cut timber on the land of the other and deliver it for a certain price per cord, was not within the statute of frauds.—Ives v. Atlantic & N. C. R. Co., N. Car., 55 S. E. Rep. 74.

73. FRAUDS, STATUTE OF—Part Performance of Parol Contract.—A party to a parol contract who has so far performed the same as to render it a fraud for the other party to repudiate the agreement can recover damages for its breach.—McLeod v. Hendry, Ga., 54 S. E. Rep. 949.

74. GUARDIAN AND WARD—Liability of Sureties.—The return of a guardian held not to operate as estopped by judgment on the surety, where the allowance of the return was not a judgment in a proceeding to which the surety and the plaintiffs were parties.—Rich & Bros. v. Fidelity & Deposit Co. of Maryland, Ga., 55 S. E. Rep. 336.

75. HUSBAND AND WIFE—Mortgage.—A mere creditor of a married woman, on her insolvency, cannot attack a mortgage executed by her on the ground that it was given to secure the debt of her husband and son.—Hawes v. Glover, Ga., 55 S. E. Rep. 62.

76. HUSBAND AND WIFE—Temporary Alimony.—On application by a wife for temporary alimony and counsel fees, where the evidence as to the cause of the separation is conflicting, the discretion of the judge in refusing the application will not be controlled.—Parks v. Parks, Ga., 55 S. E. Rep. 176.

77. INDICTMENT AND INFORMATION — Fugitives from Justice.—An avermert in an indictment that the accused are "fugitives from justice" is sufficient without further specification to put them upon notice of the charge which the government means to prove.—United States v. Greene, U. S. D. C., E. D. Ga., 146 Fed. Rep. 778.

78. INDICTMENT AND INFORMATION — Indorsement.—The record that an indictment was presented by the grand jury is sufficient to sustain the same in the absence of evidence to impeach the record, without any indorsement by the grand jury on the indictment.—State v. Sultan, N. Car., 54 S. E. Rep. 841.

79. INJUNCTION—Doubtfulness of Court's Jurisdiction.—A preliminary injunction against a state board denied by a federal court on the ground that its jurisdiction was doubtful under the eleventh constitutional amendment denying jurisdiction of suits against a state.—Smith v. Alexander, U. S. C. C., D. R. I., 146 Fed. Rep. 106.

80. INJUNCTION — Interference with Easement. — An easement of a right of way acquired by a railway company will be protected by injunction from interference without regard to the solvency of the persons interfering therewith.—Seaboard Air Line R. Co. v. Olive, N. Car., 55 S. E. Rep. 368.

81. INJUNCTION—Relocation of Railroad.—That a railroad company had begun to tear up its tracks before injunction was applied for, if wrongful and working special damage to the plaintiffs, is not ground for refusing to enjoin it.—Brown v. Atlantic & B. Ry. Co., Ga., 55 S. E. Rep. 24.

82. INJUNCTION—Trespass.—One seeking to enjoin the cutting of timber must show that he has title to the land or is in possession thereof; and if he relies on possession alone, it must be actual possession of that portion on which the trespass is being committed. — Downing v. Anderson, Ga., 55 S. E. Rep. 184.

83. INTERNAL REVENUE—Sale of Property.—The proceeds of a sale of spirtis forfeited to the United States for violation of the internal revenue law belong exclusively to the government, and cannot be applied to the payment of the tax thereon.—Harkins v. Willard, U. S. C. C. of App., Fourth Circuit, 146 Fed. Rep. 708.

84. INTOXICATING LIQUORS—Illegal Sale.—One selling intoxicating liquor in a county where the selling thereof is altogether prohibited cannot be properly indicted for the statutory offense of selling liquor without a license.—Moore v. State, Ga., 55 S. E. Rep. 327.

85. JUDGMENT—Action in Trade-Name.—Where plaintiff sues by his trade name and defendant, under plea of recoupment, recovers a judgment in such name, and sought to enforce it by garnishment, it was error to dismiss the garnishment proceedings. — Clark Bros. v. Wyche, Ga., 54 S. E. Rep. 909.

86. JUSTICES OF THE PEACE—Garnishment.—On judgment against defendant in garnishment in a justice court in which the garnishment is pending, the justice will look to such judgment to ascertain the amount of the judgment to be rendered against the garnishee.—Morrison v. Hilburn & Poole, Ga., 54 S. E. Rep. 938.

87. LARCENY—What Constitutes.—Where one, meaning to steal another's goods, fraudulently prevails on the latter to deliver them to him on the understanding that the property in them is to pass, he commits neither larceny nor any other crime by the taking, unless the transaction amounts to an indictable cheat. — Welch v. State, Ga., 55 S. E. Rep. 183.

88. LIENS—Priorities.—Under the facts held that there was no preference as between two persons to whom, in a chancery suit, liens were given on lands sold therein.—Davis v. Roller, Va., 55 S. E. Rep. 4.

89. LIFE INSURANCE—Beneficiaries.—A stipulation in a policy of life insurance held merely an appointment by the parties to the contract of a person who may collect the amount due for the benefit of the person ultimately entitled thereto.—Ogletree v. Hutchinson, Ga., 55 S. E. Rep. 179.

90. LIFE INSURANCE—Notice of Assessment.—To sustain a forfeiture for nonpayment of an assessment held that it was incumbent on the insurer to show that notice of assessment was mailed, properly addressed, and within the time fixed.—Duffy v. Fidelity Mut. Life Ins. Co., N. Car., 55 S. E. Rep. 79.

91. LIMITATION OF ACTIONS — Constructive Trusts. — Where a person taking title to land, part of the price of which had been paid by another, recognizes his rights, limitations do not run against the person paying such portion of the price.—Miller v. Saxton, S. Car., 55 S. E. Rep. 310.

92. MANDAMUS—Grounds for Writ.—Writ of *mandamus* granted by the circuit court of appeals requiring the modification of a decree entered on its mandate in bankruptcy proceedings in the district court to conform to such mandate.—*Ex parte* Chicago Title & Trust Co., U. S. C. C. of App., Seventh Circuit, 146 Fed. Rep. 742.

93. MANDAMUS — When Granted. — Under Civ. Code 1902, § 1188, *mandamus* to require county board of education to issue teacher's certificate is not the proper remedy but appeal to the state board of education.—Greenville College for Women v. Board of Education of Greenville County, S. Car., 55 S. E. Rep. 132.

94. MASTER AND SERVANT—Concurrent Negligence.—A master held liable for injuries arising from the negligence of his foreman concurring with the negligence of another servant.—Pocahontas Collieries Co. v. Williams, Va., 54 S. E. Rep. 868.

95. MASTER AND SERVANT—Contributory Negligence.—In an action by a servant to recover for personal injuries, where there was no evidence of contributory negligence, it was no excuse that other servants were accustomed to act in a similar manner.—Cawood v. Chattahoochee Lumber Co., Ga., 54 S. E. Rep. 944.

96. MASTER AND SERVANT—Duty to Warn.—An employee whose duty calls him at frequent intervals to a place where fellow servants are shoveling coal from railroad cars into a coal bin held under no legal obligation to give them notice of his presence.—Ranford v. Southern Ry. Co., Ga., 55 S. E. Rep. 183.

97. MASTER AND SERVANT—Fellow Servants.—The injury of a railroad employee while engaged in loading cars held to have been caused by the negligence of the foreman who was his fellow servant for which the company was not liable.—Baltimore & O. R. Co. v. Brown, U. S. C. C. of App., Third Circuit, 146 Fed. Rep. 24.

98. MASTER AND SERVANT—Fellow Servants.—The negligence of a fellow servant will not defeat an action for injuries if it is not the sole cause of the accident.—The Hamilton, U. S. C. C. of App., Second Circuit, 146 Fed. Rep. 724.

99. MASTER AND SERVANT — Negligence. — Failure of persons in charge of a train to give notice of approach at a railroad crossing is competent to show negligence in an action by the watchman at that crossing for injuries received.—Betchman v. Seaboard Air Line Ry., S. Car., 54 S. E. Rep. 140.

100. MASTER AND SERVANT—Relation of Parties.—The conductor of a freight train held without authority to employ plaintiff to work on his train or to work his passage to another place, and hence the carrier owed plaintiff neither the duty owing to a passenger or employee.—Vassor v. Atlantic Coast Line R. Co., N. Car., 54 S. E. Rep. 849.

101. MECHANICS' LIENS—Foreclosure.—There can be no valid judgment of foreclosure of a materialman's lien in the absence of a valid judgment against the contractor for the price of the material sold to him.—Mauck v. Rosser, Ga., 55 S. E. Rep. 82.

102. MINES AND MINERALS—Construction of Contract.—Contract for development of certain ore land held only to require plaintiff to report the substance disclosed by the development and exploration adopted by the persons to test the land.—Cleveland-Cliffs Iron Co. v. East Itasca Min. Co., U. S. C. C. of App., Eighth Circuit, 146 Fed. Rep. 232.

103. MINES AND MINERALS — Reasonable Use.— The driving of certain cross entries over the dividing line between a mine operated by a lessor, and that leased to plaintiff held not a violation of the lease prohibiting excavations within 60 feet of the dividing line or Code 1904, § 2570, forbidding excavations within 5 feet of other property without the written consent of the owner.—Cranes Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co., Va., 54 S. E. Rep. 884.

101. MORTGAGES—Estoppel.—Where the holder of a mortgage note accepted part payment from a surplus arising on a void sale under the deed without knowledge of all the facts, she was not estopped to deny the validity of the sale.—Wasserman v. Metzger, Va., 54 S. E. Rep. 893.

105. MORTGAGES—Fraud.—That a mortgage was executed in the name of a nonresident for the purpose of escaping taxation to which it would have been subject if executed in the name of the lender held no defense to a suit by the mortgagee to foreclose the same.—Waterbury v. McKinnon, U. S. C. C. of App., Ninth Circuit, 146 Fed. Rep. 787.

106. MUNICIPAL CORPORATIONS—Certiorari.—Questions not raised in the trial court touching the validity of the municipal ordinance will not furnish ground for reversal by the supreme court on exception to the overruling of a *certiorari*.—Leonard v. City of Eatonton, Ga., 54 S. E. Rep. 968.

107. MUNICIPAL CORPORATIONS—Partial Invalidity of Ordinance.—Where a portion of a municipal ordinance as to keeping open doors on the Sabbath was valid, the addition of certain invalid portions would not prevent a conviction of one violating the valid portion.—Fichtenberg v. City of Atlanta, Ga., 54 S. E. Rep. 933.

108. MUNICIPAL CORPORATIONS—Revocation of License.—Persons taking license to conduct business on the streets revocable at will of council held to take subject to such revocation.—Spencer v. Mahon, S. Car., 55 S. E. Rep. 321.

109. MUNICIPAL CORPORATIONS — Violation of Ordinance.—Where certain persons were convicted of violating a city ordinance, their subsequent conviction in the state courts for offenses arising out of the same transaction, will not affect the sentence imposed by the mayor.—Schuler v. Willis, Ga., 54 S. E. Rep. 965.

110. NEGLIGENCE—Wantonness Defined.—Wantonness is properly defined as conscious failure to observe due care and intentional doing of an unlawful act knowing such act to be unlawful.—Bussey v. Charleston & W. C. Ry. Co., S. Car., 55 S. E. Rep. 168.

111. PARTIES—Misjoinder.—After a petition has been amended by striking therefrom one of the defendants named therein, the ground of demurrer alleging a misjoinder of defendant presents no question for consideration.—Seaboard Air Line Ry. v. Randolph, Ga., 55 S. E. Rep. 47.

112. PRINCIPAL AND AGENT—Torts of Agent.—A railway company held liable to one who goes to a depot to deal with the depot agent as to matters connected with the business of the company, and is insulted by the agent.—Southern Ry. Co. v. Chambers, Ga., 55 S. E. Rep. 87.

113. PRINCIPAL AND AGENT—Undisclosed Principal.—One who has dealt with an agent cannot, upon discovery of an undisclosed principal, hold both the agent and the principal liable on the contract, but must elect between the two, and an election once made he must abide by it.—Berry v. Chase, U. S. C. C. of App., Sixth Circuit, 146 Fed. Rep. 625.

114. PRINCIPAL AND SURETY—Discharge of Surety.—That a bank, the owner of a note on which there is a surety, is indebted on general deposit account to the principal on the note, and fails to exercise its right to set off the note against the deposit, does not discharge the surety on the note.—Davenport v. State Banking Co., Ga., 54 S. E. Rep. 977.

115. RAILROADS — Change of Location.—A railroad company with power to choose its road between designated termini, after it has exercised its discretion, cannot change its location without express legislative authority.—Brown v. Atlantic & B. Ry. Co., Ga., 55 S. E. Rep. 24.

116. RAILROADS—Contract of Carriage.—A carrier having knowledge of a quarantine rendering a journey impossible held bound to give notice to a passenger seeking information in connection therewith.—Hazeltine v. Southern Ry. Co., S. Car., 55 S. E. Rep. 142.

117. RAILROADS — Injury to Alighting Passenger. — Where a woman was induced to alight by the negligence of a conductor at a strange place, remote from her destination, the burden held to be on plaintiff to prove the allegations of fact on which she relies for the recovery.—Georgia Ry. & Electric Co. v. McAlister, Ga., 54 S. E. Rep. 957.

118. RAILROADS — Kicking Cars Over Crossing. — To kick cars over a much used crossing held negligence.—Wilson v. Atlantic Coast Line, N. Car., 55 S. E. Rep. 257.

119. RAILROADS—Occupation of Streets.—Where a municipality consents to the occupation of the streets by a railroad company upon condition, and the condition is broken, the railroad company is without authority to occupy or use the streets.—Edwards v. Pittsburg Junction R. Co., Pa., 65 Atl. Rep. 798.

120. RAILROADS—Stopping at Destination of Passenger.—Failure to stop a train at a station and allow a passenger an opportunity to alight, held to render the lessor liable where the road is being operated by a lessee.—Pickens v. Georgia R. & Banking Co., Ga., 55 S. E. Rep. 171.

121. RECEIVERS—Bank Deposit.—An attorney who received a check from a corporation as a retainer for services to be rendered, and who presented and received payment of the check after he had knowledge that a receiver had been appointed for the property of the corporation will be required to turn over the sum so received to the receiver.—Bowker v. Haight & Freese Co., U. S. C. C., S. D. N. Y., 146 Fed. Rep. 257.

122. RECEIVERS—Right of Creditor to Urge Appointment.—Generally a creditor by note which has not been reduced to judgment and with no lien is not entitled to a receiver.—Virginia-Carolina Chemical Co. v. Provident Sav. Life Assur. Soc., Ga., 54 S. E. Rep. 929.

123. REPLEVIN—Bail Trover.—In bail trover to recover certain samples sold by plaintiff's traveling salesman, under the evidence, the court could hold as a matter of law that the agent had authority to sell and did sell to defendant and to grant a nonsuit.—M. H. Lauchheimer & Sons v. Jacobs, Ga., 55 S. E. Rep. 55.

124. SALES—Action for Price.—In an action for the price of goods sold, letters written to plaintiff, signed by a partnership into which the purchaser entered after the sale, and which partnership conducted the business, were admissible. — Springer v. Indianapolis Brewing Co., Ga., 55 S. E. Rep. 53.

125. SALES—Contracts.—A contract for the sale of a patented product held not to obligate defendant to accept any part of the product specified in the contract, and that no such obligation could be implied.—Amalgamated Gum Co. v. Casein Co. of America, U. S. C. C., N. D. N. Y., 146 Fed. Rep. 900.

126. SALES—Delivery of Inferior Article.—Where defendant purchased a new machine from plaintiff's agent, but an old machine was delivered, defendant was not bound to retain and pay for the same.—International Harvester Co. v. Smith, Va., 54 S. E. Rep. 859.

127. SALES—Entire Contract.—A contract for the sale of 20,000 bushels No. 2 white corn, bulk, at 59 1-2 cents per bushel, 10,000 bushels to be shipped in February and 10,000 in March, is an entire contract.—Henderson Elevator Co. v. North Georgia Milling Co., Ga., 55 S. E. Rep. 50.

128. SALES—Warranty of Quality.—Where goods of a certain quality were sold, and the buyer ordered another shipment of the same quality, the seller warranted the last shipment to be of equal quality with the first.-

Springer v. Indianapolis Brewing Co., Ga., 55 S. E. Rep. 53.

129. SCHOOLS AND SCHOOL DISTRICTS—Expulsion of Pupil From School.—Where a pupil has been refused admission to a public school for failure to comply with an alleged illegal requirement of the trustees, the remedy of his parent is by *mandamus* and not by injunction to restrain the enforcement of such requirement.—McCaskil lv. Bower, Ga., 54 S. E. Rep. 942.

130. SHERIFFS AND CONSTABLES — Attachment.—The value of the use of property during the time of its attachment may be shown in an action for damages from the attachment by the market value of the use where it was attached, but not by such market value in another city.—Shearer v. Taylor, Va., 55 S. E. Rep. 7.

131. SHERIFFS AND CONSTABLES—Trial of Money Rule. —A sheriff is not protected from a rule against him on the ground that the execution on which the rule is based issued on an irregular proceeding.—Horrigan v. Savannah Grocery Co., Ga., 54 S. E. Rep. 961.

132. SIGNATURES — Validity.— Where a husband signs his wife's name to a mortgage purporting to be executed by her in her immediate presence and by her direction, the effect is the same as if she had signed the mortgage. —Hawes v. Glover, Ga., 55 S. E. Rep. 62.

133. SPECIFIC PERFORMANCE—Contract for Sale of Waterworks.—Where a city has refused to perform its contract to purchase the waterworks of a company at a price named on their productive worth to be determined by appraisers, the water company has no remedy at law as complete as specific performance in equity.—Castle Creek Water Co. v. City of Aspen, U. S. C. C. of App., Eighth Circuit, 146 Fed. Rep. 8.

134. SPECIFIC PERFORMANCE—Mutuality of Obligation. —Specific performance of a contract to furnish sewerage facilities at a specified annual rental held properly denied, there being no mutuality of obligation to continue the service, as between the corporation furnishing the same and the person using it.—Soloman v. Wilmington Sewerage Co., N. Car., 55 S. E. Rep. 800.

135. SUBROGATION—Void Foreclosure Sale.—Where a power of sale in a mortgage was void, the mortgagor or those claiming under him are entitled to have the mortgage debt credited with the amount of the bid at the sale.—Griffin v. Griffin, S. Car., 55 S. E. Rep. 817.

136. SUNDAY—Violation of Sunday Law.—That on Sunday there were fewer electric lights in a "penny arcade" than on week days; that no music was played and that the attendants were excused and change was made at a soda fountain permitted to be operated on such day, was no defense for a keeping open on the Sabbath.—Fichtenberg v. City of Atlanta, Ga., 54 S. E. Rep. 933.

137. TELEGRAPHS AND TELEPHONES — Failure to Deliver Telegram. — Plaintiff, in an action for failure to deliver a telegram, can show notice to defendant of the purpose of the message.—Jones v. Western Union Telegraph Co., S. Car., 55 S. E. Rep. 318.

138. TELEGRAPHS AND TELEPHONES—Negligence in Delivery.—Where a telegraph company changed the name of the addressee of a commercial telegram to that of his competitor and delivered the message to him, it is evidence of reckless disregard of the addressee's rights.—Lathan v. Western Union Telegraph Co., S. Car., 55 S. E. Rep. 134.

139. TRADE-MARKS AND TRADE-NAMES—Unfair Competition.—Stockholders in a corporation are not individually liable or subject to injunction because of unfair competition practiced alone by the corporation.—Hall's Safe Co. v. Herring Hall-Marvin Safe Co., U. S. C. C. of App., Sixth Circuit, 146 Fed. Rep. 37.

140. TRESPASS—Pleading —In trespass on realty it is not necessary for plaintiff to set forth in his petition, or attach thereto, an abstract of the title which he relies on. —Burns v. Horkan, Ga., 54 S. E. Rep. 946.

141. TRIAL—Instructions.—Where the court in charging fails to correctly present contentions of the losing party, and practically instructs that he admitted the contention of the opposite party concerning a vital issue, a new trial is demanded.—Hightower v. Ansley, Ga., 54 S. E. Rep. 939.

142. TRIAL—Instructions.—If a party desires more definite instructions on any issue, he must make a special request for them, or he cannot be heard to complain of the indefiniteness of the instructions on appeal.—Ives v. Atlantic & N. C. R. Co., N. Car., 55 S. E. Rep. 74.

143. TRIAL—Misconduct of Counsel.—Where to an objection an improper argument is sustained and the argument is stopped, failure to instruct to disregard the argument or reprimand counsel or declare a mistrial is not ground for reversal where no request was made therefor.—Southern Ry. Co. v. Brown, Ga., 54 S. E. Rep. 911.

144. TRUSTEES — Disposition of Property.—A conveyance of trust property held to give the purchaser the beneficiary's interest, so that his possession to the date of her death was lawful.—Cherry v. Cape Fear Power Co., N. Car., 55 S. E. Rep. 287.

145. USURY—Equitable Relief.—The debtor who gives his creditor a security deed which has the taint of usury may at any time repudiate the fiction that the relation of landlord and tenant exists between them without first yielding possession of the premises described in the deed.—Brown v. Bonds, Ga., 54 S. E. Rep. 933.

146. USURY—Who May Assert.—Even if an assignment of salary earned was part of a contract for a usurious loan and void, the right to set up the usury and have the assignment declared void would rest only with the assignor, his personal representatives, and privies —Western Union Telegraph Co. v. Ryan, Ga., 55 S. E. Rep. 21.

147. VENDOR AND PURCHASER—Bona Fide Purchaser. —Defendant held not to have acquired any title or right to possession of the land in controversy from his grantor, who had no title, and was therefore not entitled to defend on the doctrine of *bona fide* purchaser.—Lindblom v. Rocks, U. S. C. C. of App., Ninth Circuit, 146 Fed. Rep 669.

148. VENDOR AND PURCHASER—Deficiency in Quantity of Land Conveyed.—In an action by a vendee to recover for alleged deficiency in quantity of the land conveyed, the declaration must show want of knowledge by the vendee at the time of the sale and what opportunity he had for knowledge.—Kendall v. Wells, Ga., 55 S. E. Rep. 41.

149. VENDOR AND PURCHASER —Option to Purchase.— An option to purchase is a continuing offer by the vendor to sell and its acceptance by the vendee completes the contract, and estops the vendee from subsequently repudiating it. —Castle Creek Water Co v. City of Aspen, U. S. C. C. of App., Eighth Circuit, 146 Fed. Rep. 8.

150. VENDOR AND PURCHASER—Tender of Performance. —In contracts for the sale of land where the conditions as to performance by the respective parties are concurrent and one is willing and ready to perform, and the other refuses to perform, the right of action is complete. —McLeod v. Hendry, Ga., 54 S. E. Rep. 949.

151. WATERS AND WATER COURSES—Public Water Supply.—Contract between water company and city to furnish water for fire protection held not to require it to furnish without cost water for use in a private system of fire protection.—Cox v. Abbeville Furniture Factory, S. Car., 54 S. E. Rep. 880.

152. WITNESSES—Leading Questions.—Where a party calls the opposing party and examines him, it is in the discretion of the court to refuse to prohibit counsel for the party so called from asking leading questions on the cross examination.—M. H. Lauchheimer & Sons v. Jacobs, Ga., 55 S. E. Rep. 55.

153. WITNESSES—Refusal to Answer Questions.—It is the duty of a witness being examined before a master in chancery to answer such questions as the master directs after objections thereto have been overruled and for his refusal to do so he is subject to punishment for contempt unless he himself makes some claim of personal privilege —Bowker v. Haight & Freese, U. S. C. C., S. D. N. Y., 146 Fed. Rep 256.